78-1873

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

ERNEST GABAUER, JOE DE LOS SANTOS, JR., COLEMAN G. LEWIS, JR., C. L. GREENFIELD, ELBERT HILL and CLAUDE J. HUSKEY,

Petitioners,

vs.

LEONARD WOODCOCK, EMIL MAZEY, KENNETH WORLEY, C. E. MATTIX, EDWARD LAVIN, JOHN T. WEBSTER, ROY HARTZELL and DONALD YOUNG,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Ernest Gabauer, Joe De Los Santos, Jr., Coleman G. Lewis, Jr., C. L. Greenfield, Elbert Hill and Claude J. Huskey (hereafter Petitioners) pray that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, pp. 29-58) is reported at 594 F.2d 662, 100 LRRM 2808. The opinion of the District Court (App. B, *infra*, pp. 59-67), is reported in part at 425 F.Supp. 1,* 94 LRRM 2497.

*The officially reported decision of the District Court does not include the order entered January 19, 1977 (App. B, *infra*, p. 67) dismissing both Counts of the Complaint.

JURISDICTION

The judgment of the Court of Appeals (App. C, *infra*, p. 68), was entered on March 6, 1979. Rehearing was denied on March 27, 1979. (App. D, *infra*, p. 69). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Where union members allege in their complaint under 29 U.S.C. 501(b) that Defendant union officers have wrongfully spent union dues monies for political and ideological purposes contrary to the best interests of the union membership, for purposes which are not authorized under the union's constitution and bylaws and for purposes unrelated to the union's collective bargaining functions, and that Defendant officers have used union dues monies to finance federal election campaigns in violation of the Federal Corrupt Practices Act, 18 U.S.C. 610, was it proper for the Court of Appeals to affirm dismissal of such complaint for failure to state a claim upon which relief may be granted?

2. Was it proper for the Court of Appeals to resolve factual disputes adversely to Plaintiffs' claims [as to whether particular expenditures of union dues monies were authorized and as to whether union funds contributed to federal election candidates were commingled with union dues monies in violation of 18 U.S.C. 610 and as to Plaintiffs' claims that Defendants knowingly breached their duties of trust by secretly diverting union dues monies to purposes and outside groups without adequate reports or disclosures to the membership and contrary to the best interests of the union members] without permitting Plaintiff union members to have any hearing or discovery, where Plaintiffs had filed affidavits and discovery requests under F.R.C.P. 56(f) stating that discovery was necessary?

3. In reversing the District Court's dismissal of the action under 29 U.S.C. 431(c), 461(b) [for an order to allow Plaintiff union members to inspect union records], should the Court have granted Plaintiffs' summary judgment where it is undisputed that Defendant union officers had denied the requested inspection before the action was commenced for reasons which are admittedly unlawful, and where Plaintiff union members properly asserted in their request that it was made for "just cause" and this is not genuinely disputed by the Defendants?

STATUTES INVOLVED

This case involves interpretation of Sections 201, 301-304, 501 and 603(a) of the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. 431, 461-464, 501 and 523 (hereinafter LMRDA), and of the Federal Corrupt Practices Act, 18 U.S.C. 610 which was in effect when this action was instituted in District Court on March 21, 1972.[1] Pertinent portions of these statutes are reprinted in App. E, *infra*, pp. 70-81. See also provisions of 29 U.S.C. 464 quoted at note 4, *infra*, and Civil Rule 56(f), quoted at note 5, *infra*.

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1. Although 18 U.S.C. 610 was repealed by Act May 11, 1976, P.L. 94-283, 90 Stat. 496, known as the Federal Election Campaign Act Amendments of 1976, Title I, Section 114 of that Act, 90 Stat. 495, provided: "Except as otherwise provided by this Act, the repeal by this Act of any section or penalty shall not have the effect of releasing or extinguishing any penalty, forfeiture, or liability incurred under such section or penalty, and such section or penalty shall be treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture, or liability."

STATEMENT OF THE CASE

Nature of Action: Petitioners (plaintiffs below) are six members of UAW International Union[2] and its Local No. 25, in St. Louis, Missouri. They filed suit on March 21, 1972 in the Eastern District of Missouri (A. 13-25) against officers and representatives of the UAW International Union and Local 25[3], invoking jurisdiction under 28 U.S.C. 1331(a) and 1337.

Under Count One, Plaintiffs sought court orders allowing them to inspect and copy union financial and trusteeship records under Sections 201(c) and 301(a) and (b) of LMRDA [29 U.S.C. 431(c), 461(a) and (b)]. Under Count Two, Plaintiffs (having obtained leave of court to do so, A. 6-12) brought a derivative action under Section 501(b) of LMRDA [29 U.S.C. 501(b)], seeking to compel the Defendant union officers to make an accounting of union property and funds which Plaintiffs claimed had been misappropriated or diverted secretly and without authority to political and revolutionary groups and causes opposed to the best interests of the union and its membership in breach of fiduciary duties owed by the Defendant officers under Section 501(a) of LMRDA [29 U.S.C.

2. The "UAW International Union" refers to International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (hereafter "UAW").

3. Defendants include the then President (Leonard Woodcock) and Secretary-Treasurer (Emil Mazey) of UAW; UAW's Region 5 Director (Kenneth Worley), who served as "Administrator" (trustee) over the Chevrolet Unit of Local 25 and Chairman of the UAW Region 5 Community Action Program Council; an assistant to Worley in each of his capacities (C. E. Mattix); Local 25 President (Edward Lavin); Local 25 Financial Secretary (Roy Hartzell); Local 25 Recording Secretary (John T. Webster); and the Financial Secretary of UAW Region 5 CAP Council and Greater St. Louis UAW CAP Council (Donald Young). (A. 13-14).

501(a)] and under the common law rights preserved to Plaintiffs under 29 U.S.C. 413, 483, 523 and 524.[4]

Decisions Below: The District Court dismissed Count Two for Failure to state a claim for which relief could be granted, and dismissed Count One for improper venue and pleading deficiency. (App. B, *infra*, pp. 61-67).

An en banc decision of the Eighth Circuit Court of Appeals unanimously reversed the dismissal as to Count One (in part) remanding Count One for further proceedings to determine whether Plaintiffs had "just cause" to inspect the union records, and affirmed dismissal of Count Two by a four judge majority opinion (App. A, *infra*, pp. 29-54) with three judges dissenting. (App. A, *infra*, pp. 54-58).

The four Judge majority found, contrary to Plaintiffs' allegations in the complaint and in affidavits (A. 13-25, 153-286), that the Defendants had authority to expend the union funds (derived from compulsory dues collected under union shop agreements) for contributions to outside

4. Plaintiffs invoked pendent jurisdiction of state law claims preserved by these provisions of LMRDA. Plaintiffs also rely on jurisdiction provided under 29 U.S.C. 461(b), 462, 463, 464(a) and (b). (A. 39-43, 145). The last sentence of 29 U.S.C. 464(a), relating to actions claiming unlawful imposition of trusteeships, provides: "Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate." 29 U.S.C. 464(b) provides: "For the purpose of actions under this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization (1) in the district in which the principal office of such labor organization is located, or (2) in any district in which its duly authorized officers or agents are engaged in conducting the affairs of the trusteeship." A trusteeship had been imposed by UAW officers over the Chevrolet Unit of Local 25 on June 12, 1970, which Plaintiffs claimed amounted to a wholesale misappropriation of the assets and affairs of the local unit in violation of 29 U.S.C. 501(a). (A. 22-23, 30-31, 39-44, 143-144, 153-172).

groups whose purposes Plaintiffs claimed were antithetical to the interests of the UAW members. The majority opinion found that even Plaintiffs' claims that Defendants had used union funds in violation of Federal Corrupt Practices Act, 18 U.S.C. 610, did not state a claim because the Defendants "relied on their apparent authority" to so use union funds. (App. A, *infra*, p. 54). At note 7 of the majority's opinion, it was conceded that a Section 501 claim could be stated for use of union funds in violation of the Federal Election laws, but that such claim could not be made where the Defendants claimed to have had "apparent authority" to so spend the union funds. (App. A, *infra*, p. 54).

The dissenting opinion strongly argues that Plaintiffs did state a claim for which relief may be granted under LMRDA Section 501(b). It argues that the majority erred in conferring unlimited discretion upon UAW International officers in their expenditure of huge amounts of money collected annually from compulsory dues (about $148 million) and that the UAW constitution should not be construed as granting such unlimited discretion. The dissent pointed to Article 2 of the UAW constitution limiting the assistance it should give to organizations to those "having purposes and objectives *similar or related*" to those of UAW; Article 7(2) which authorizes expenditures of UAW funds to achieve purposes and objections "not inconsistent" with purposes of the UAW, and which the UAW Executive Board believes "will further the *general interest and welfare of the membership*"; and to Article 23(1) which indicates that the UAW's Community Action Program (CAP) is "*to improve the economic and social conditions of UAW members and their families and to promote the general welfare and democratic way of life for all people.*" (Emphasas by dissenting opinion, App. A, *infra*, pp. 55-56).

The dissenting opinion argues that the above quoted language shows that the UAW officers do not have unlimited discretion as to how to spend the union's funds, and that Plaintiffs' allegations that Defendants had contributed union assets "to various organizations and groups espousing and promoting ideological doctrines and causes totally unrelated to, and in many instances antithetical to, the interests and welfare of the union and its members" (including thirteen groups listed in the complaint and the majority opinion) do state a claim. The dissenting opinion found that the dismissal was improper under F.R.C.P. 12(b) because the majority improperly resolved factual disputes contrary to Plaintiffs' allegations (App. A, *infra*, p. 55, note 1) and the dismissal was not proper under F.R.C.P. 56, because Plaintiffs were denied discovery and opportunity to prove their claim, and Plaintiffs should have had an opportunity to find out through discovery the goals and methods espoused by the recipients of the challenged UAW contributions. (App. A, *infra*, p. 57).

The dissenting opinion argues that if the ends and means adopted by the recipient organizations were, as alleged, antithetical to the interests and welfare of the UAW membership and inconsistent with the objectives of the UAW, Plaintiffs have a cause of action under LMRDA Section 501 for misuse of union funds by UAW officers, and it was not proper for the Court to ignore the allegations of Plaintiffs that the questioned expenditures "*were in violation* of the Union's constitution." (App. A, *infra*, p. 57).

Facts - Count Two: UAW Local 25 and UAW International Union have had collective bargaining agreements covering Plaintiffs and their fellow workers at the General Motors plant in St. Louis, Missouri since before 1961. Such agreements include union shop clauses which required each

employee (including Plaintiffs) to pay dues and fees to Local 25 as a condition of employment which average $10 per month per employee, and which total more than One Million Dollars ($1,000,000) annually. (A. 14).

Substantial sums of Local 25 compulsory dues are paid over to UAW International Union and other organizations controlled by Defendants. Since May 1969, Local 25 has paid three per cent (3%) of each member's dues to the Community Action Program (CAP) Funds, including the Greater St. Louis CAP Fund, the Missouri CAP Fund, and the UAW COPE Fund. Local 25 pays to such CAP funds in excess of $30,000 per year from compulsory dues income. (A. 20, 50-55).

The UAW International financial reports filed annually with the Secretary of Labor disclosed contributions or donations of Million of Dollars to various political and other outside groups for years 1961 through 1967. Those reports (A. 222-272) show that donations of union funds went to groups, purposes and causes totally unrelated to or in many cases opposed to the interests of the Local 25 members and their families. (A. 135-136). The UAW's reports for 1968 through 1970 do not list who the recipients of such donations were, but for each of those years show contributions ($1,753,718; $2,074,268; and $527,601) to outside groups which were not identified in any way. These contributions were not for the benefit of UAW members or their families, but were to support causes and purposes opposed to the best interests of the UAW and its membership. (A. 136).

The substantial reduction of reported outside contributions for 1970 results from a concealment of approximately $1,000,000 to $2,000,000 of contributions through the creation of the CAP Council which has been used to divert compulsory dues monies to various outside groups and

causes, the specific nature and amounts of which have not been reported to the UAW membership and have not been included in the UAW's financial reports filed with the Secretary of Labor. (A. 136, 273-275). The generalized type of disclosures made in the 1968 and subsequent financial reports results from a deliberate concealment by Defendant union officers from the Local 25 membership of the uses and purposes to which their dues monies have been put through the outside donations, but which uses are contrary to the best interests and desires of UAW members generally and have not been authorized by them. (A. 136).

Plaintiffs have discovered that some of the groups which have been recipients of UAW Local 25 compulsory dues monies include many groups who are controversial, or who have engaged in revolutionary or disruptive tactics and programs which are strongly opposed by the UAW membership and are contrary to the best interests of the UAW members. Plaintiffs have discovered their union dues monies have been wrongfully given to outside groups such as National Students Association (NSA), Students for a Democratic Society (SDS), Students' Non-Violent Coordinating Committee (SNCC), Dubois Memorial Committee and numerous other such groups. (A. 21-22, App. A, *infra*, pp. 37-38).

Plaintiffs believe their compulsory dues monies have been given as donations to candidates for federal elective offices in violation of 18 U.S.C. 610. Various schemes and devices have been used by Defendants to conceal such unauthorized uses of union dues monies, and such criminal uses of dues monies, including the creation of the CAP council and the use of fictitious "flower funds" which are in reality political "slush funds". (A. 138-139).

Funds have been given by CAP to various United States Congressmen listed in Plaintiffs' affidavit. (A. 140-

142). News reports have shown that Defendant Woodcock, now Ambassador to China, had used his union office to seek high political offices or appointments on his personal behalf, and he has apparently been using union funds to advance his own selfish political interests rather than for the benefit of the Union and its members. (A. 140-141). A clipping from the Local 25 newsletter shows a United States Senator thanking the CAP in St. Louis for contributions to his campaign. (A. 143, 276-277).

Some $30,000 to $60,000 per year have been unlawfully taken by Defendants from Local 25 union dues income each year since 1961 for such unauthorized or unlawful purposes. (A. 150-151).

Plaintiffs' action under Count Two seeks an order that the Defendant union officers make an accounting as to the uses to which the union dues monies taken from Local 25 since 1961 have been made, and seeks orders that the Defendants be required to reimburse the Union treasury for any expenditures which were not properly authorized, or which were contrary to the best interests of the UAW members or were not legitimate purposes for which compulsory dues could be expended since they were not "solely" for the benefit of members as required under 29 U.S.C. 501(a).

When the Defendants sought to dismiss the action and sought summary judgment against the Complaint, Plaintiffs filed a detailed affidavit, setting forth allegations including those covered above. (A. 126-152, 153-286). Plaintiffs opposed the Defendants' motion for summary judgment because the case was not ripe for summary judgment, since Defendants had failed to respond to interrogatories propounded more than a year earlier (A. 73-93), Plaintiffs had filed a motion to compel discovery (A. 103-104) and Plaintiffs had not been afforded any opportunity for depositions (A. 124-126, 128-129). Plaintiffs' affidavit in opposition to summary judgment specifically stated that it was impossible for Plaintiffs to further respond to or defend against the Defendants' summary judgment motion until discovery was permitted, which discovery Plaintiffs requested permission to undertake before the court ruled on the motion, as provided in F.R.C.P. 56(f).[5] (A. 128-129).

Facts - Count One: Plaintiffs had sought [through letters dated August 19, 1971 (A. 26-28) and November 17, 1971 (A. 34-36)] permission to inspect certain records of the International and Local Union officers relating to Local 25 and the trusteeship imposed by the International Union over the Chevrolet Unit of Local 25. Although these requests by Plaintiffs were made in good faith and for just cause, Defendants refused to grant permission for inspection for two stated reasons: (1) because Plaintiff Huskey was alleged by Defendants not to be a member in good standing, a position later reversed by Defendants; and (2) because the Defendants would not permit Plaintiffs to inspect any records with assistance of their accountants and attorneys, as Plaintiffs had requested, a position which the Court of Appeals found to be unlawful. (A. 15-16; App. A, *infra*, p. 35).

After this action was filed by Plaintiffs, defense counsel appeared in Court and admitted that all reasons advanced by Defendants for refusing the inspection had been without merit, but seeking to interpose after the action was filed a claim that Plaintiffs did not have "just cause". (A. 133-134). This newly asserted claim of lack of "just cause"

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5. Federal Rule of Civil Procedure 56(f) states: "Should it appear from the affidavits of a party opposing the motion [for summary judgment] that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." See note 17, *infra*.

is without merit according to the unrefuted affidavit of Plaintiff Huskey because of a long series of just causes therein listed: Plaintiffs' belief that Defendants are hiding funds not included in Local 25 reports and secretly and unlawfully using compulsory dues funds to finance campaigns for federal elections in violation of the law and that Defendants are using a series of schemes and devices spelled out in the affidavit seeking to divert union funds to purposes other than legitimate collective bargaining purposes, and to purposes opposed to the best interests of the UAW and its membership (A. 131-133); Defendants have concealed the actual use of dues and fees derived from Local 25 members through the CAP organizations, whose expenditures have not been included in the UAW or Local 25 financial reports filed with the Secretary of Labor as required by law (A. 132-133); the failure of Defendants to file reports disclosing the identities of persons or groups receiving donations of union funds. (A. 136). The record also discloses that the trusteeship imposed over Local 25 was for unlawful purposes and that reports were not filed as to that trusteeship within the time required by law, and then the reports did not comply with the law and did not disclose any lawful purpose for the trusteeship. (A. 30-31, 33-34, 38).

Defendants have presented no affidavits which dispute the claims of "just cause" by Plaintiffs. However, the Court of Appeals, while reversing the dismissal of Count One, remanded Count One for the District Court to determine whether "just cause" exists for Plaintiffs to be permitted to inspect the records. (App. A, *infra*, pp. 33-34).

REASONS FOR GRANTING THE WRIT

I. Review Should Be Granted to Decide Important Questions of Federal Law Under LMRDA Section 501. The Decision Below Threatens to Nullify the Derivative Action by the Union Members to Require Their Union Officers to Make an Accounting As to Funds Claimed to Have Been Expended in Violation of the Fiduciary Duties of the Officers to Hold Union Funds and Properties "Solely for the Benefit of the Organization and Its Members".

LMRDA Section 501, 29 U.S.C. 501 (App. E, *infra*, pp. 70-81), outlines the nature of the fiduciary duties owed by labor organization officers and agents, and provides civil and criminal penalties for breaches of those duties. Subsection (a) recognizes that the union officers "occupy positions of trust" and must therefore hold the union's money and property "solely for the benefit of the organization and its members." They must manage, invest and spend union funds only as authorized under the union's constitution and bylaws, and resolutions thereunder. But the statute specifically provides that union officers shall not be relieved of these fiduciary duties by "general exculpatory" provisions in the union constitution or bylaws, and any generalized provisions purporting to give blanket immunity to officers from liability for breaches of their fiduciary obligations "shall be void as against public policy". Subsection (b) provides for derivative actions to be brought by the members against officers who are "alleged to have violated the duties" mentioned above to "secure an accounting or other appropriate relief". Subsection (c) provides for criminal penalties for the union officer who converts union funds not only "to his own use" but also to "the use of another".

The federal statutes which recognize the fiduciary duties of union officers do not replace the duties previously existing under the common law of the States, but supplement the rights and remedies previously existing.[7] See LMRDA Section 603, 29 U.S.C. 523. (App. E, *infra*, pp. 78-79). Indeed, it has been recognized that the common law principles concerning the fiduciary duties of trustees must be consulted in order to fashion a body of federal common law under LMRDA Section 501. *Johnson* v. *Nelson*, 325 F.2d 646, 650-651 (8th Cir. 1963); *Highway Truck Drivers and Helpers Local 107* v. *Cohen*, 182 F.Supp. 608, 617 (E.D. Pa. 1960), aff'd 284 F.2d 162 (3rd Cir. 1960), cert. den. 365 U.S. 833 (1961). Those cases recognized that LMRDA Section 501 attempted to define the fiduciary duties of union officers "in the broadest terms possible". *Ibid.*

The common law duties of trustees are listed and explained in Sections 169-189, RESTATEMENT OF TRUSTS 2d, and in Professor Scott's Treatise using the same section numbers. Those duties include duties of keeping and rendering accurate accounts to the beneficiaries and to furnish complete information as to the income and expenditures of the trust property. RESTATEMENT, TRUSTS 2d, §§172-173. If the trustee is requested by the beneficiary for information concerning the use of trust funds and the trustee refuses to give that information, the trustee is guilty of a breach of trust for which the beneficiary is entitled to equitable relief in an action for an accounting. RESTATEMENT, TRUSTS 2d, §§197, 199-201; SCOTT ON TRUSTS, §§197, 199-201; 1 C.J.S., *Accounting*, §§14-47, particularly §21; 90 C.J.S., *Trusts*, §391, p. 709.

7. *Rekant* v. *Schochtay-Gasos Union Local 446*, 194 F.Supp. 187 (E.D. Pa. 1961) (denying motion to dismiss), 205 F.Supp. 284 (E.D. Pa. 1962) (opinion after trial) (E.D. Pa. 1962); *Thomas* v. *Penn Supply & Metal Corp.*, 35 F.R.D. 17 (E.D. Pa. 1964); *Posner* v. *Utility Workers Union*, 47 Cal.App.3rd 970, 121 Cal. Rptr. 423 (1975); *Gilbert* v. *Hoisting & Portable Engineers*, 384 P.2d 136, 138-139 (Ore. En Banc 1963), cert. den. 376 U.S. 963 (1964).

A breach of trust occurs if the fiduciary makes expenditures which are unauthorized or outside his powers. §201, SCOTT and RESTATEMENT, TRUSTS 2d. The scope of a trustee's powers is considered at §§185-196 of SCOTT and RESTATEMENT, TRUSTS 2d. At §190.10, SCOTT points out that ordinarily the trustee is without power to make a gift of trust property to persons other than the trust beneficiaries. Such power can never be presumed without proof that the beneficiary has consented to such outside gifts after full knowledge of all relevant facts and without concealment, deception or other misconduct by the trustee. §216, SCOTT and RESTATEMENT, TRUSTS 2d. If the trustee acts dishonestly or with improper motive, his action is outside his power. *Id.*, §187. This is true no matter how broadly the trust instrument describes the trustee's power or discretion, because the trustee is obviously not empowered to act in bad faith or with improper motive. *Ibid.*

The four judge majority below (with three judges filing a strong dissent) approved the District Court's dismissal of the derivative action brought under Count Two of the complaint.

Under Part A, the majority opinion concludes, without citation of authority and without noting the common law principles of trust law discussed above, and without noting that Plaintiffs invoked the court's pendent jurisdiction of state law claims[8] (see note 4, *supra*), that the Plaintiffs could not use LMRDA Section 501 as an independent discovery tool, and that LMRDA Section 201 provides the only discovery tool available to Plaintiffs. (App. A, *infra*, p. 41). That narrow view of Section 501 also overlooks the

8. *Libutti* v. *DiBrizzi*, 337 F.2d 216 (2d Cir. 1954).

rights of Plaintiffs under the common law. See *Mooney* v. *Bartenders' Local 284*, 48 Cal.2d 841, 313 P.2d 857 (En Banc 1957); *Robinson* v. *Nick*, 235 Mo.App. 461, 136 S.W.2d 374, 386-387 (St.L.Mo.App. 1940); 1 C.J.S., *Accounting*, §21, in addition to the above citations to RESTATMENT, TRUSTS and SCOTT ON TRUSTS.

Under Part B, the majority stated the dismissal of Count Two was justified by *McNamara* v. *Johnston*, 522 F.2d 1157 (7th Cir. 1975), cert. den. 425 U.S. 911 (1976), a case wherein UAW members in Chicago had similarly sought an accounting as to what they claimed to have been unauthorized expenditures by officers of the UAW of union dues monies of the same type which the present Plaintiffs claim to have been unauthorized. The majority then quotes from UAW Constitution Art. 2, Sections 4-5, Art. 23, Section 1, and mentions Art. 7, Section 2, Art. 23, Section 8 (App. A, *infra*, pp. 42-43) and finds that those provisions authorized the defendant officers to have broad discretion to contribute union funds to outsiders including political candidates and groups of the type alleged in the complaint. The majority found the intended discretion to have been *unlimited*. ("The union membership chose not to specifically restrict the discretion of union officers.", App. A, p. 44). The dissenting opinion, however, finds that the expenditures challenged by Plaintiffs are not immune from scrutiny in this action and strongly argues that Plaintiffs should be able to question the motives and purposes of the Defendants and the outsiders to whom union funds have been contributed, to determine whether the funds have been used as authorized in the constitution or whether, as alleged by Plaintiffs, union funds have been used without proper authority for purposes which are adverse to the best interests of the Plaintiffs and their fellow UAW members. (App. A, *infra*, pp. 54-58).

The majority overlooked the significance of this Court's earlier decisions in *Street*,[9] *Allen*[10] and *Abood*,[11] where in each case, this Court has ruled the statute involved was constitutional, to the extent that it allowed compelling employees to pay union dues and fees as a condition of employment, only because *those statutes themselves forbade the use of such compulsory dues for any purposes other than collective bargaining purposes for the benefit of the employees from whom the dues and fees are exacted.* As stated in *Abood*, 431 U.S. at p. 220, referring to the holding in *Street*: "The Court ruled, therefore, that the use of compulsory dues for political purposes violated the Act itself."

The majority erred in assuming that Defendants had *unlimited* discretion to violate the federal labor statutes and to spend compulsory dues for political and other non-bargaining purposes and to use compulsory dues even for financing campaigns for federal elective office in violation of 18 U.S.C. 610. As ruled in *United States* v. *Boyle*, 482 F.2d 755 (D.C. Cir. 1973), cert. den. 414 U.S. 1076, where defendant was convicted for misappropriating union funds to the use of another in violation of LMRDA Section 501(c) because of a contribution to a candidate for federal office in violation of 18 U.S.C. 610, the defendant cannot claim authorization to do what is unlawful under federal statutes.[12]

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9. *Machinists* v. *Street*, 367 U.S. 740 (1961).

10. *Railway Clerks* v. *Allen*, 373 U.S. 113 (1963).

11. *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977).

12. "Neither authorization by any union officer or body, nor any resulting benefit to the union, would have rendered lawful the transfer of general union funds to a federal political campaign. * * * Thus, approval or benefit cannot make the conversion 'to the use of another' in this case any less unlawful. If the use to which the money is knowingly transferred is unlawful, then the transfer constitutes a violation of §501(c)." [482 F.2d pp. 764-765].

Although the majority opinion admits that Defendants could not claim authorization under their constitution to make expenditures which violate specific provisions or express policies of federal law (App. A, *infra*, p. 45), the majority overlooked the fact that *this Court has previously ruled that Congress did forbid use of compulsory dues for non-bargaining purposes*, as noted in *Street, Allen* and *Abood*.

Defendants should not be permitted to claim authority to *give away* compulsory dues funds in violation of federal labor laws under which those funds have been collected, and in violation of the general rule that trustees shall not be assumed to have power to give away trust funds to those who are not beneficiaries of the trust. SCOTT ON TRUSTS, §190.10. Plaintiffs should have been permitted to have depositions and discovery and a hearing on the merits to question the motivation and purposes of Defendants and the recipients of the union funds. Section 187, SCOTT and RESTATEMENT, TRUSTS 2d.

In an action for an accounting, it should not be Plaintiffs' burden to demonstrate that the challenged expenditures were *not* authorized. Rather, it is the burden of the Defendants to make a full disclosure of the expenditures and to demonstrate how those expenditures *were* authorized. *Union Electric Co.* v. *Boehm*, 92 F.Supp. 177, 180 (E.D. Mo. 1950), appeal dismissed 186 F.2d 715, 716 (8th Cir. 1951); *Highway Truck Drivers* v. *Cohen, supra*, 182 F.Supp. at p. 619.

Under Part C, the majority opinion ruled the Plaintiffs could not rely upon allegations that Defendants had contributed union funds to candidates for federal offices in violation of 18 U.S.C. 610, because the Federal Election Campaign Act Amendments of 1976 repealed 610 and re-enacted its substance at 2 U.S.C. 441b. However, the

Court overlooked the fact that Title I, Section 114 of that Act, 90 Stat. 495 (quoted at note 1, *supra*) provided that 18 U.S.C. 610 shall be "treated as remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of any penalty, forfeiture or liability."[13]

The majority erroneously relies on *Cort* v. *Ash*, 422 U.S. 66 (1975) as justifying the dismissal of Count Two. That decision expressly noted that Congress has shown concern, in permanently expanding §610 to unions, "with protecting union members from use of their funds for political purposes."[14] After noting that the relationship of a stockholder to his corporation is vastly different from the *involuntary relationship* between the union and its members, the Court expressly indicated in *Cort* v. *Ash, supra*, that it intimated no view whether the decision in that case would mean a union member could not sue his union officers in a derivative action implied under 18 U.S.C. 610 for unlawful expenditures of funds. 422 U.S. at 81 (note 13).

This case calls for the Court to answer the question left open in *Cort* v. *Ash*, and to construe the provisions of LMRDA Section 501 which have not previously been construed by this Court. The majority opinion below, and the *McNamara* decision from the Seventh Circuit which was followed by the majority, too narrowly construe the fiduciary duties of union officers, and the responsibilities of federal courts under LMRDA Section 501. By ruling that Plaintiffs' only right to discovery is under

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13. Since this action was instituted in March 1972, it was clearly erroneous for the majority to view the 1976 amendments as having extinguished Plaintiffs' claims, in view of the provision quoted at note 1, *supra*. *Cort* v. *Ash, infra*, does not discuss this point.

14. 422 U.S. at 81 (note 13), citing *United States* v. *CIO*, 335 U.S. 106, at 135, 142 (Rutledge, J., concurring).

LMRDA Section 201 (App. A, *infra*, p. 41), the majority overlooks 29 U.S.C. 523. Plaintiffs had a right before enactment of LMRDA Section 201 to bring a common law action for an accounting, and 29 U.S.C. 523 provides that the LMRDA does not extinguish that right. The District Court should have exercised pendent jurisdiction along with the LMRDA Section 201 claim under Count One or the District Court should have pendent jurisdiction under Count Two. If Plaintiffs cannot maintain an accounting action under Count Two, then the right of inspection under Count One is illusory, as without Count Two Plaintiffs would have no remedy for the wrongful expenditures revealed under the Count One action.[15]

II. This Case Calls for the Supreme Court to Exercise Its Power of Supervision. The Court of Appeals Has Permitted the District Court to Dismiss a Complaint Without Assuming the Facts Alleged by Plaintiffs Are True. Even If the Dismissal Be Viewed As a Summary Judgment, the Court of Appeals Has Assumed As True Factual Assertions Made by Defendants (Many of Which Were Not Sworn to by Defendants) and Has Assumed That Facts Asserted by Plaintiffs' Affidavit Are Not True, and Summary Judgment Should Not Have Been Permitted to Be Entered Against Plaintiffs Without Permitting Them to Have Discovery First As Provided Under F.R.C.P. 56(f). The Decision Below Conflicts With Rulings of the Supreme Court and of Other Courts of Appeal.

As pointed out by the dissenting opinion below (App. A, *infra*, pp. 54-55, note 1), the majority opinion committed

15. *Cort* v. *Ash*, *supra*, indicates at 422 U.S. p. 72 (note 6) that the plaintiff in that case had voluntarily dismissed his state law claim, thus precluding any possible claim of pendent jurisdiction, unlike the present case. The majority opinion below

(Continued on following page)

plain error in *assuming the truth of facts opposed to Plaintiffs' allegations* while affirming the F.R.C.P. 12(b)(6) dismissal of the District Court. (App. B, *infra*, pp. 59-60). This Court has repeatedly recognized the elementary rules which must be followed in reviewing dismissals under F.R.C.P. 12(b)(6). The motion to dismiss admits the allegations of the complaint. *Gardner* v. *Toilet Goods Assn.*, 387 U.S. 167, 172 (1967). The complaint must be taken "at face value". *California Transport* v. *Trucking Unlimited*, 402 U.S. 508, 515-516 (1972). A complaint must not be dismissed for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 335 U.S. 41, 46 (1957). Since the complaint alleged that Defendants had used fraudulent schemes to unlawfully and without authority divert large sums of money to outsiders for improper purposes which were contrary to the best interests of the UAW members, and that compulsory dues have been used for federal election campaigns in violation of 18 U.S.C. 610, it was clearly erroneous for the majority to assume that the *opposite facts* were true. It was clearly erroneous for the majority to assume the good faith of Defendants when the complaint clearly accused Defendants of bad faith use of fraudulent schemes and devices to misappropriate union dues monies to the use of others. The majority's following of the Seventh Circuit's decision in *McNamara* v. *Johnston*, *supra*,

Footnote continued—

(App. A, *infra*, p. 54, note 7) recognizes *Miller* v. *American Telephone and Telegraph Co.*, 507 F.2d 759 (3rd Cir. 1974) as properly holding that a stockholder has a right to bring a derivative action under state law because of expenditures in violation of 18 U.S.C. 610 and also recognizes that if union members can prove union funds have been spent in violation of 18 U.S.C. 610 federal law expressly recognizes a derivative action to remedy such unlawful use of union funds under 29 U.S.C. 501(b). That recognition demonstrates the magnitude of the error and injustice in not allowing Plaintiffs an opportunity for discovery or trial to prove their Count Two claims.

shows that this is the second recent occasion where a court of appeals has grossly departed from the accepted standards for reviewing a dismissal of an action of this type. This case, therefore, calls for this Court to exercise its supervisory powers to correct such gross departure from accepted judicial proceedings.

Although the District Court characterizes its decision as a dismissal for failure to state a claim upon which relief could be granted (App. B, *infra*, pp. 64, 66), the majority attempts to justify the dismissal under the summary judgment rule. (App. A, *infra*, p. 41, note 3). However, the majority failed to follow the accepted standards for reviewing dismissals under F.R.C.P. 56. The majority failed to view all pleadings, affidavits and documents in the record in the light most favorable to Plaintiffs (against whom the motion was filed), as required under the holding in *Poller* v. *Columbia Broadcasting System*, 368 U.S. 464, 468, 473 (1962). The Second Circuit recognized that the drastic procedures of summary judgment are generally not appropriate in derivative actions because the defendants have the exclusive knowledge of the facts and records and in such actions have the burden of coming forward with explanations to justify their actions which are called into question by the complaint. *Schoenbaum* v. *Firstbrook*, 405 F.2d 215 (2d Cir. 1965), cert. den. 395 U.S. 906.[16]

Plaintiff Huskey filed an affidavit (A. 126-152) with 18 exhibits attached (A. 153-286) which contain extensive accusations and allegations that Defendants have grossly and in bad faith exceeded their power and authority in converting union funds to the use of outside groups for unlawful purposes. Our Statement of the Case mentions some of those allegations, which include allegations of

16. That case involved a stockholder's derivative action, which is identical in concept to this action under 29 U.S.C. 501(b) insofar as the point being considered is concerned.

use of compulsory dues for non-bargaining purposes and for contributions to the federal election campaigns in violation of 18 U.S.C. 610. It was, therefore, clearly erroneous for the majority to assume the opposite facts were true in reviewing the dismissal as having been entered under F.R.C.P. 56. *Poller* v. *C.B.S., supra.*

After the District Court had indicated it was going to treat the motions to dismiss as motions for summary judgment (A. 121-122), Plaintiffs timely filed opposing pleadings (A. 122-126) as well as the Huskey affidavit mentioned above. (A. 126-286). Plaintiffs alleged that Defendants' motion should not be considered ripe for determination under summary judgment procedures, because Defendants had failed to answer interrogatories propounded by Plaintiffs more than a year earlier (A. 73-93) as to which Plaintiffs had previously filed motions to compel discovery. (A. 103-104). Plaintiffs further asserted that discovery must be afforded to Plaintiffs, as provided under F.R.C.P. 56(f) (quoted at note 5, *supra*), before Defendants' motion to dismiss could be properly treated as a summary judgment motion, because it was impossible for Plaintiffs to fully respond to the summary judgment motion without discovery. (A. 124-126). Plaintiff Huskey's affidavit repeated this assertion. (A. 128-129).[17]

17. Paragraph 4 of Huskey's affidavit (A. 128-129) stated:

> 4. Affiant shows the Court that it is impossible for plaintiffs herein to provide affidavits as to many facts or to provide copies of documents to document the facts alleged in the complaint, due to the fact that the plaintiffs in this action have not been afforded any opportunity to take depositions or to request production of documents in this particular case, and although the plaintiffs did file interrogatories which were served upon the defendants' attorneys more than one year ago, on June 15, 1972, requesting the defendants to answer detailed questions pertaining to facts and matters which are proper subjects of discovery herein and the truthful answers to which would further support the motion by plaintiffs herein for summary judgment and would refute

(*Continued on following page*)

Other Circuits have ruled that because of F.R.C.P. 56(f), it is error for the District Court to grant a summary judgment against Plaintiffs who have been deprived of opportunities for discovery. *Umdenstock* v. *American Mortgage & Investment Co.*, 495 F.2d 589 (10th Cir. 1974); *Shoenbaum* v. *Firstbrook, supra.*[18] The majority's decision below is in conflict with those decisions from the Tenth and Second Circuits, and constitutes such a clear departure from accepted judicial proceedings as to call for exercise of this Court's supervisory powers.

Footnote continued—

the contentions made by the defendants in support of their motions to dismiss which the Court is treating as a motion for summary judgment, and although the plaintiffs have filed motions to compel defendants to answer said interrogatories or in the alternative for a default judgment against the defendants, and motions to compel said answers to be made, the Court herein has not required the defendants to answer said interrogatories and until said answers are provided and until said discovery is permitted including depositions of each of the defendants, and production of all of the documents which the plaintiffs have requested permission to inspect under Count I and which are reasonably necessary for the plaintiffs and their attorneys and accountants to inspect and copy, the plaintiffs are not able to provide many facts which are in existence but which the plaintiffs have not been permitted to discover and the Court is therefore requested pursuant to Rule 56(f) to refuse the application by the defendants for a judgment of dismissal herein and to order a continuance of the requests by defendants for such dismissal to permit full and complete discovery herein to be made by the plaintiffs and to permit the plaintiffs to thereafter further oppose the said motion to dismiss and summary judgment motion based upon such full and complete discovery.

18. At 405 F.2d, page 218, the Court stated:

Summary Judgment

[1, 2] The district court's grant of summary judgment against the plaintiff was accompanied by a refusal of his request for discovery. This court has indicated that summary judgment should rarely be granted against a plaintiff in a stockholder's derivative action especially when the plaintiff has not had an opportunity to resort to discovery procedures. See, for example, Subin v. Goldsmith, 224 F.2d 753 (2d Cir.), cert. denied, 350 U.S. 883, 76 S.Ct. 136, 100

(*Continued on following page*)

III. The Remand of Count One for a Hearing As to Whether Plaintiffs Have "Just Cause" to Inspect Records As Requested Under LMRDA Section 201 Unnecessarily Delays and Frustrates Plaintiffs' Rights. Other Circuits Have Ruled That the Union Officers Waive Their Right to Contest Plaintiffs' Showing of Just Cause by Failing to Raise the Point As in This Case, and the Decision Below Is in Conflict With Those Decisions.

Defendants Hartzell, Worley and Mattix refused to permit Plaintiffs to inspect any records with the presence of an attorney or accountant. The decision below finds that was unlawful, because Plaintiffs have "the right to be assisted by experts in making the examination, *Antal* v. *District 5, United Mine Workers of America*, 451 F.2d 1187 (3rd Cir. 1971)." (App. A, *infra*, p. 35). See also Judge Griffin Bell's opinion for the Fifth Circuit in *Local 1419, I.L.A.* v. *Smith*, 301 F.2d 791, 796 (5th Cir. 1962), where it was found that analogous cases which allowed stockholders to have assistance of attorneys and accountants should be followed in cases of this type, and that the rights of union members under LMRDA 201 would be "utterly meaningless" if they could not have such assistance.

Footnote continued—

L.Ed. 779 (1955); Colby v. Klune, 178 F.2d 872 (2d Cir. 1949); Fogelson v. American Woolen Co., 170 F.2d 660 (2d Cir. 1948). The plaintiff typically has in his possession only the facts which he alleges in his complaint. Having little or no familiarity with the internal affairs of the corporation, he is faced with affidavits setting forth in great detail management's version of what actions were taken and what motives led the affiants to take these actions. Since the facts in such a case are exclusively in the possession of the defendants, summary judgment should not ordinarily be granted where the facts alleged by the plaintiff provide a ground for recovery, at least not without allowing discovery in order to provide plaintiff the possibility of counteracting the effect of defendants' affidavits.

(*Continued on following page*)

The only reason given by Defendants for refusing the requested inspection were admittedly unlawful reasons. (A. 131-134, 278-286). Plaintiffs were never requested, prior to filing of this action, to show any further just cause, and Defendants, therefore, should have been ruled to have waived any requirement for a hearing on the question of "just cause". *Fruit and Vegetable Packers, etc., Local 760* v. *Morley*, 378 F.2d 738, 743-744 (9th Cir. 1967) held the union officers waived any requirement for a showing of "just cause" because they failed to respond to the request for inspection. In this case, the waiver was even more clear, because the only response made by Defendants to Plaintiffs' request was the refusal, for unlawful reasons, to allow the inspection and a failure by Defendants to raise any question as to "just cause". It was, therefore, unnecessary for the Court of Appeals to remand this case for a determination of "just cause".

The axiom "justice delayed is justice denied" is applicable here, and the 1971 records inspection request should not be further delayed by the requirement of an unnecessary hearing in the District Court, and possible further

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Footnote continued—

[3] Indeed in many stockholder's derivative actions there will be issues as to the knowledge, intent and motive which will require a full trial with an opportunity to observe the demeanor of the witnesses, and to conduct cross-examination in open court. In such cases summary judgment cannot be granted even after discovery has been had. See Subin v. Goldsmith, supra, 224 F.2d at 757. See also Poller v. CBS, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962) ("We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot."); Cross v. United States, 336 F.2d 431, 434 (2d Cir. 1964); Alvado v. General Motors Corp., 229 F.2d 408, 411-12 (2d Cir. 1955), cert. denied 351 U.S. 983, 76 S.Ct. 1050, 100 L.Ed. 1497 (1956). (For a discussion of a number of additional cases, see Judge Frank's opinion in the *Subin* case.)

appeals before the inspection is afforded, when the record is clear there is no genuine dispute as to "just cause" and Plaintiffs are entitled to inspect the records as a matter of law under LMRDA Section 201. The decision below conflicts with *Local No. 1419, I.L.A.* v. *Smith, supra*, where the Fifth Circuit approved summary judgment in similar circumstances.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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June, 1979

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1094

Ernest Gabauer, Joe DeLos Santos, Jr., Coleman G. Lewis, Jr., C. L. Greenfield, Elbert Hill and Claude J. Huskey,
Appellants,

v.

Leonard Woodcock, Emil Mazey, Kenneth Worley, C. E. Mattix, Edward Lavin, John T. Webster, Roy Hartzell and Donald Young,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: April 13, 1978
Filed: March 6, 1979

Before GIBSON, Chief Judge, and LAY, HEANEY, BRIGHT, ROSS, STEPHENSON and HENLEY, Circuit Judges, en banc.

HEANEY, Circuit Judge.

This case is before the Court en banc on the appellees petition for rehearing. The appellants are members of the United Automobile, Aerospace and Agricultural Implement

Workers of America (UAW) and its Local 25 in St. Louis, Missouri. The appellees are, or were at the time this litigation commenced, officers of the UAW International Union, Local 25, or affiliated Community Action Program Councils (CAP Councils). The complaint contains two counts. In the first count, the appellants invoke §§201(c) and 301(a) and (b) of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§431(c) and 461(a) and (b), to gain an opportunity to inspect various union books and records. In the second count, the appellants allege a cause of action based on §501 of the LMRDA, 29 U.S.C. §501, for the appellees' involvement in the disbursement of union funds to various political, social and civic organizations. The District Court dismissed the first count in part for improper venue and in part for a pleading deficiency. The court also dismissed the second count in its entirety for failure to state a claim upon which relief could be granted. When the matter was first before us, we affirmed in part and reversed in part as to the first count, and affirmed the dismissal of the second count. We adhere to our earlier opinion.[1]

COUNT I

The appellants filed their complaint in the Eastern District of Missouri. In Count I, they requested an order requiring the appellees to make available to them certain union records. Section 201(b) requires that every labor organization file with the Secretary of Labor an annual report, signed by the president and treasurer of the organi-

1. We have adopted much of the unpublished opinion of the panel that initially decided this matter. Our original opinion is withdrawn. The District Court's opinion is published at 425 F.Supp. 1 (E.D. Mo. 1976). *See Huskey v. United Automobile, Aerospace & A. I. Wkrs.*, 520 F.2d 1096 (8th Cir. 1975), *cert. denied*, 423 U.S. 1061 (1976); *Gabauer v. Woodcock*, 520 F.2d 1084 (8th Cir. 1975), *cert. denied*, 423 U.S. 1061 (1976).

zation which describes, among other things, the disbursements made by it during the preceding fiscal year. In addition, §201(c) provides:

> Every labor organization required to submit a report under this title shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in * * * the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report.

29 U.S.C. §431(c).

Section 301(a) subjects labor organizations which establish and administer trusteeships over subordinate bodies to certain additional reporting requirements. Every such labor organization must file with the Secretary of Labor semiannual reports signed by the president, treasurer, and trustees which include the reasons for the establishment or continuation of the trusteeship and the financial condition of the subordinate organization. In addition, the labor organization must file the annual §201(b) financial report on behalf of the local unit. Finally, §301(b) makes the private inspection provisions of §201(c) applicable to all §301(a) reports.

The appellees filed a motion to dismiss the complaint, stating, with respect to Count I, that venue was improper; that the appellants failed to meet the just cause and specificity requirements of §201(c); and that the action was barred in part by the statute of limitations. The District Court granted the appellees' motion to dismiss in part for improper venue and in part for a pleading deficiency.

Venue is governed by §201(c). This section keys venue to the principal office of the labor organization required to file the report in question. The appellants seek to verify four annual financial reports for Local 25. Three of these were prepared and signed by the president and treasurer of the local, but one was apparently filed by the UAW International and its trustees on behalf of Local 25. In addition, the appellants seek certain reports and records from the local CAP councils and other records from the UAW which has its principal offices in Detroit. The appellees conceded to the trial court that venue was proper as to the records necessary to substantiate the reports filed by local officials. Conversely, there can be little dispute that venue was improper with respect to the reports filed by the International officials pertaining to files and records kept in Detroit.

The controversy involves the records necessary to verify the trustees reports filed pursuant to §301(a). The lower court ruled that venue was improper as to these reports:

> As this Court reads 201(c), since the UAW was the organization required to file a report by 301, a suit for the records necessary to verify this report could only have been brought against the UAW or its officers and could not have been brought against Local 25 or its officers, even though the report concerned the financial condition of Local 25. A suit under 201(c) cannot be brought against the UAW in this Court since venue would be improper.

Gabauer v. Woodcock, 425 F.Supp. 1, 4 (E.D. Mo. 1976).

The appellants insist that the existence of a trusteeship should not change the place of venue for reports filed on behalf of the local unit.

Although the venue provisions of §§301(b) and 201(c) could be construed in the manner adopted by the District Court, we think the better view would permit suit for the verification of §201(b) reports signed by trustees on behalf of a subordinate labor organization to be brought at the location where the records necessary to verify those reports are most likely to be. The trusteeship had been discontinued by the time the suit was commenced, so we cannot imagine that the UAW would have kept the records at issue in its Detroit office during any relevant period of time. Taking that fact into account, we hold that venue was appropriate insofar as the appellants sought records actually under the control of Local 25 officials, even though those records are relevant only to reports filed by the UAW and its trustees. For the records actually under the control of International officials, however, venue may be found only in the district of the principal International office.

Although the District Court understood that venue was appropriate for some of the records sought, it dismissed Count I in its entirety. The court explained: "[U]ntil amended pleadings are filed for that part of Count I over which this Court has venue, the question of the statute of limitations cannot be resolved." *Id.* To remedy this, the court dismissed Count I, giving the appellants twenty days within which to file an amended petition. We are aware of no authority which suggests that a complaint is subject to dismissal if it fails to plead in such a way that the statute of limitations question can be resolved on a motion to dismiss. In general, the limitations question is an affirmative defense to be pleaded and proved by the appellees. We note that Federal Rule of Civil Procedure 12(e) provides:

> If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired.

The record in this case reflects no such motion, and we can perceive no need for a *sua sponte* dismissal of the complaint on this ground in this case.[2]

Since venue was proper with respect to the bulk of the records sought, we reinstate the complaint and remand this case to the District Court for further proceedings. In view of the continuing disputes as to whether just cause has been shown for the examination of the books and the nature and scope of the examination if such cause has been shown, we deem it important to lay down guidelines for the assistance of the District Court.

First, the party seeking to examine the union records has the burden of showing just cause.

Second, the just cause requirement must be read in a narrow sense when invoked to resist an examination. It is sufficient if a reasonable union member would be put to further inquiry. *Fruit and Vegetable Packers & Ware. Local 760 v. Morley*, 378 F.2d 738 (9th Cir. 1967); *Allen v. Local 92, Iron Workers*, 47 L.R.R.M. 2214 (N.D. Ala. 1960).

Third, a principal purpose of the reporting provision is to provide union members with the vital information necessary for them to take effective action in regulating affairs of their organization. Individual members of

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2. We express no view on the statute of limitations question.

a union are fully competent to regulate union affairs if they have minimum democratic safeguards and detailed essential information about the union. S.Rep. No. 187, 86th Cong., 1st Sess. 8 (1959), *reprinted in* I NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, at 405 (1959) [hereinafter cited as LEGISLATIVE HISTORY]; *United States v. Budzanoski*, 462 F.2d 443 (3rd Cir.), *cert. denied*, 409 U.S. 949 (1972).

Fourth, the right to examine includes the right to make such copies as are reasonably necessary for the conduct of the examination, subject to the right of the union to protect itself against harassment and copying of protected materials, *Conley v. United Steelworkers of America, etc.*, 549 F.2d 1122 (7th Cir. 1977), and the right to be assisted by experts in making the examination, *Antal v. District 5, United Mine Workers of America*, 451 F.2d 1187 (3rd Cir. 1971).

Fifth, the records of the Missouri CAP Council and the Greater St. Louis CAP Council are union records within the purview of §201.

COUNT II

In Count II of their complaint, the appellants allege that the appellees have violated §501 of the LMRDA which provides in part as follows:

> (a) * * * The officers, * * * and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization

and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) * * * When any officer, * * * or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, * * * or representative in any district court of the United States * * * to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be ex parte.

They allege that the violations consist of unlawfully and wrongfully diverting a large part of

> CAP fund money into the political campaigns of candidates for public office and for various partisan political activities totally unrelated to the interests and welfare of the union and its members or to the functions and purposes of the union as collective bargaining representatives of plaintiffs and their fellow dues paying members of the union. Plaintiffs are further informed and believe, and therefore aver, that defendants have paid over and expended, and are now continuing to pay over and expend, substantial amounts of CAP fund money in the form of cash contributions to candidates for federal office, including candidates for President, Vice-President, Senate and House of Representatives, and have otherwise expended said CAP funds to support the candidacy of candidates for said offices, all in violation of the federal statutory prohibitions against such expenditures by labor organizations provided in the Federal Corrupt Practices Act. 18 U.S.C. Section 610.
>
> * * * [They] have regularly and over long periods of time unlawfully and wrongfully diverted a substantial part of union membership dues money and other union assets to various organizations and groups espousing and promoting ideological doctrines and causes totally unrelated to, and in many instances antithetical to, the interests and welfare of the union and its members * * * [including]:
>
> National Students Associations (NSA)
>
> Students for a Democratic Society (SDS)
>
> Students Non-Violent Coordinating Committee (SNCC)

New Mobilization for Peace

Turn Toward Peace

Citizens Committee for a Nuclear Test Ban

National Committee for a Sane Nuclear Policy (SANE)

Americans for Democratic Action (ADA)

United World Federalists

Peace With Freedom Inc.

Dubois Memorial Committee

Confederate Spanish Societies

United States Committee for Democracy in Greece and numerous other such organizations.

The appellants further allege that:

> [The] defendants have wrongfully refused to permit the plaintiffs personally and through attorneys and accountants of their choosing and designation to inspect the financial records of Local 25 and the various funds controlled by the defendants into which the fees, dues and assessments exacted from the plaintiffs and their fellow members have been diverted by the defendants, including the aforesaid CAP Council funds.
>
> Defendants have rendered it impossible for the plaintiffs to have taken any measures to prevent the unlawful and wrongful diversions of union money and assets as aforesaid due to the secrecy of the defendants in committing said violations and due to the wrongful taking over by the defendants of all of the assets, properties, and affairs of the Chevrolet Unit of Local 25 in such manner as to prevent the plaintiffs from being able to effectively exercise any rights under

> the Local Union bylaws or Constitution or to be able to have access in any meaningful way to any of the intra-union remedies and procedures.

The appellants finally allege that they

> * * * hav[e] fully exhausted all remedies and procedures available to them to the best of their abilities[.]
>
> Prior to filing this action, plaintiffs have requested the Executive Boards of UAW International and UAW Local 25, to file suit to secure an accounting by defendants and to recover damages from them for violation of their fiduciary duties * * *, but the said labor organizations and the governing boards and officers thereof have failed and refused to take such action[.]

The appellants asked the District Court to:

> A. Direct defendants * * * to furnish a full and complete accounting for the period from 1962 to the present with respect to moneys received by them in their capacity as officers or representatives of Local 25, or the International Union, or in respect of any other fund derived from dues and fees of members of Local 25, including CAP funds, and to furnish a full and complete accounting for such period respecting all moneys expended by them including all amounts expended for or in connection with partisan political activities and support of ideological causes or organizations or groups espousing ideological causes.
>
> B. Direct defendants * * * [to] make available for inspection by plaintiffs and such accountants and attorneys as they may employ all books, accounts, and records pertaining to the financial affairs of Local

25 UAW Region 5 CAP funds, Greater St. Louis CAP funds, and any other funds derived from dues and fees of the members of local 25.

C. Issue an order restraining and enjoining said defendants in their capacities as officers or representatives of Local 25 or the International Union from making any expenditures, either directly or indirectly, for partisan political activities or for support of ideological causes or organizations or groups espousing ideological causes, from the dues and fees paid in by plaintiffs and other employees of the General Motors Corporation Chevrolet Assembly Plant under and through the compulsory membership requirements of the labor agreements as herein alleged.

D. Require the defendants individually to repay to Local 25 all sums of money wrongfully diverted by them into partisan political campaign activities and ideological causes and organizations in violation of the rights of such members and the plaintiffs as aforesaid.

E. Issue an order requiring UAW, UAW Local 25 and the officers thereof to pay reasonable attorney's fees and other costs and expenses of this action, including a reasonable fee of any accountants or other persons whose services may be necessary to obtain full and complete disclosure of the financial records and data of UAW Local 25, and other funds administered by defendants as herein alleged.

The District Court dismissed this count for failure to state a cause of action. We feel that it acted properly.

A.

We do not view §501 as an independent discovery tool to investigate official use of union funds. Section 201 provides that tool. If §501 were read as broadly as appellants would have it, §201 would become superfluous. Section 501 is but one provision in an entire act. It is not intended to encompass all of the duties and rights of the entire act. Section 201 is the provision intended by Congress to compel the union hierarchy to reveal to the membership the nature and detail of official union activities. As construed by this Court, that section will provide the membership with the information they need. Section 501, by contrast, describes not a general duty to report but the nature of the obligation an individual assumes with his union office. Thus, insofar as the appellants invoke §501 as a discovery tool to investigate official uses of their funds, their efforts are misplaced. Section 201 provides their remedy if one exists.

B.

We believe that the trial court properly followed *McNamara v. Johnston*, 522 F.2d 1157 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), and correctly held that the appellees did not breach their fiduciary duty by making the questioned expenditures.[3] In our view, the expendi-

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3. The decision appealed from must be treated as an order of summary judgment. Rule 12(b) states in pertinent part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56 * * *.

The lower court treated the matter as a motion for summary judgment. This was clearly appropriate inasmuch as both parties submitted extensive affidavits and exhibits relating to the stated claim.

tures were clearly authorized by the union's constitution and resolutions of the union's national convention.[4]

The 1968 UAW convention gave the International Executive Board (IEB) interim authority to establish a national and local CAP structure to replace the soon-to-be-terminated relationship with the AFL-CIO programs. The IEB thereafter established a CAP structure which has since been ratified by UAW conventions.

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4. Though the appellants do not presently pursue their private claims, those remedies remain unaffected by the outcome of this derivative litigation. The UAW has adopted a rebate procedure under which the appellants are entitled to a rebate of a proportion of their dues corresponding to the amount of union funds which are allocated to political activities. The UAW Constitution, Article 16, Section 7, provides:

> (a) Any member shall have the right to object to the expenditure of a portion of his dues money for activities or causes primarily political in nature. The approximate proportion of dues spent for such political purposes shall be determined by a committee of the International Executive Board, which shall be appointed by the President, subject to the approval of said Board. The member may perfect his objection by individually notifying the International Secretary-Treasurer of his objection by registered or certified mail; provided, however, that such objection shall be timely only during the first fourteen (14) days of Union membership and during the fourteen (14) days following each anniversary of Union membership. An objection may be continued from year-to-year by individual notifications given during each annual fourteen (14) day period.
>
> (b) If an objecting member is dissatisfied with the approximate proportional allocation made by the committee of the International Executive Board, or the disposition of his objection by the International Secretary-Treasurer, he may appeal directly to the full International Executive Board and the decision of the International Executive Board shall be appealable to the Public Review Board or the Convention Appeals Committee at the option of said member.

The appellees contend that the UAW's rebate procedure, together with the failure of the appellants to avail themselves of that remedy, bars this suit, relying on *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Brotherhood of Railway and S.S. Clerks v. Allen*, 373 U.S. 113 (1963); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *Railway Employes Dept. v. Hanson*, 351 U.S. 225 (1956). The appellants object that

(*Continued on following page*)

The 1972 UAW Constitution catalogues some of the objectives of the UAW in Article 2:

> Section 4. * * * to vote and work for the election of candidates and the passage of improved legislation in the interest of all labor. * * *
>
> Section 5. To engage in legislative, political, educational, civic, welfare and other activities which further, directly or indirectly, the joint interests of the membership of this organization in the improvement of general economic and social conditions * * *.

Article 23, Section 1, describes the objective and purpose of the UAW Community Action Program:

> [I]t shall engage in community, civic, welfare, educational, environmental, cultural, citizenship-legislative, consumer protection, community services and other activities to improve the economic and social conditions of UAW members and their families and to promote the general welfare and democratic way of life for all people.

Footnote continued—

the procedure is deficient in various respects. These arguments are inapposite. In each of the cases cited in this note, individuals sought to recover for themselves union dues or agency fees that the union had devoted to political and ideological purposes. While a rebate procedure may have some effect on such private claims, *compare Reid v. McDonnell Douglas Corporation*, 443 F.2d 408 (10th Cir. 1971), *after remand*, 479 F.2d 517 (1973), *with Seay v. McDonnell Douglas Corporation*, 427 F.2d 996 (9th Cir. 1970), *after remand*, 533 F.2d 1126 (1976), it cannot bar derivative claims of the sort pressed here.

Since the appellants in this case have eschewed their personal rights in favor of a derivative cause of action on behalf of the union for the recovery of damages from union officers, the issues in this case are very different than those of the cases cited above. We need not consider, as did those courts, the fiduciary duty of a union to its dissenting members. The issue in this case is the very different duty of union officers to the union organization. The adoption of a rebate procedure by the organization has little relevance to the question whether an officer has fulfilled the trust of his office.

Article 7, Section 2, authorizes the expenditure of union funds to accomplish the objectives of the UAW and confers on the International Executive Board substantial supervisory discretion. To similar effect is Article 23, Section 8. In addition, convention resolutions affirmatively encouraged support for diverse causes, many of which have no more proximate relation to collective bargaining than do the groups disliked by the appellants. The membership did not try, by either the constitution or the resolutions, to circumscribe the discretion of union officials. The appellants argue that the pertinent provisions require that expenditures be for "the benefit of the members" but the language quoted above invokes much broader concerns. The union membership chose not to specifically restrict the discretion of union officers. Given the broad authorizations endorsed by the union membership and the absence of specific restrictions, this Court has neither the power nor standards by which to review expenditures challenged by a minority of the union merely because of their politically controversial character.

The appellants contend that the constitutional provisions and resolutions are void under §501 as general exculpatory clauses. *McNamara v. Johnston, supra,* disposed of an identical claim as follows:

> Section 501 was intended to follow "the well-established distinction between conferring authority upon an agent or trustee, which is permissible and protects him against liability, and attempting to excuse breaches of trust, which is here made void as against public policy." H.R. Rep. No. 741, 86th Cong., 1st Sess. 81-82, U.S. Code Congressional and Administrative News, 2480 (1959). Without doubt, the provisions and resolutions upon which the UAW relies fall within the former category of measures that confer authority.

Id. at 1164.

We agree with that disposition.

We find little merit in the appellees' view that any expenditure unrelated to legitimate collective bargaining activities violates §501. The plain language of the section belies their argument. Section 501 specifically provides that union representatives have the duty to expend union funds in accordance with the union's constitution, bylaws and resolutions of the governing bodies adopted thereunder. *See Bright* v. *Taylor,* 554 F.2d 854 (8th Cir. 1977); *Pignotti* v. *Local #3 Sheet Metal Workers' Int. Ass'n,* 477 F.2d 825 (8th Cir.), *cert. denied,* 414 U.S. 1067 (1973); *Johnson* v. *Nelson,* 325 F.2d 646 (8th Cir. 1963); *Highway Truck Drivers & Helpers, etc.* v. *Cohen,* 284 F.2d 162 (3rd Cir. 1960), *cert. denied,* 365 U.S. 833 (1961); Clark, *The Fiduciary Duties of Union Officials Under Section 501 of the LMRDA,* 52 Minn. L. Rev. 437 (1967); Katz, *Fiduciary Obligations of Union Officers Under Section 501 of the Labor-Management Reporting and Disclosure Act of 1959,* Lab. L. J. 542 (June, 1963); Note, *The Fiduciary Duty of Union Officers Under the LMRDA: A Guide to the Interpretation of Section 501,* 37 N. Y. U. L. Rev. 486 (1962); Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959,* 58 Mich. L. Rev. 819 (1960); Smith, *The Labor-Management Reporting and Disclosure Act of 1959,* 46 Va. L. Rev. 195 (1960).

There will, of course, be exceptions to this rule, *e.g.,* where the expenditures are violative of a specific provision or express policy in the Act, such as §202(a) conflicts of interest; §401(g), using union funds to promote the candidacy of persons; and §503(a), making a loan to an officer in excess of $2,000. But the exceptions are not applicable here. Without express authorization of Congress, we cannot take unto ourselves the role of deciding which causes a union can or cannot support.

The legislative history of §501 also supports the view we have adopted. *See McNamara* v. *Johnston, supra.* The section originated in the House Education and Labor Committee. The report of the Committee emphasized that the government must make certain that the power of labor unions was used "for the benefit of employees whom the unions represent * * * and not for the personal profit and advantage of the officers and representatives of the union." H.R. Rep. No. 741, on H.R. 8342, 86th Cong., 1st Sess. 11 (1959), *reprinted in* I LEGISLATIVE HISTORY at 769. Nothing in the report indicates any intent on the part of the House Committee to tell unions that they could not spend their money on unpopular causes or organizations if such expenditures were authorized by the membership. To the contrary, the report states that:

> [O]ur language does not purport to regulate the expenditures or investments of a labor organization. Such decisions should be made by the members in accordance with the constitution and bylaws of their union. Union officers will not be guilty of breach of trust when their expenditures are within the authority conferred upon them either by the constitution and bylaws or by a resolution of the executive board, convention or other appropriate governing body (including a general meeting of the members) not in conflict with the constitution and bylaws.

Id at 81, *reprinted in* I LEGISLATIVE HISTORY at 839.[5]

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5. Professor Archibald Cox served as a consultant to the Senate Labor Committee in drafting the LMRDA. In writing about the problem that concerns us here, he stated:

> If there were any ambiguity it would be dispelled by the statement of five members of the House Labor Committee in reporting the committee bill for they were the five who sponsored the bill and they included Congressman O'Hara, who proposed Section 501 in the Labor Committee.

(Continued on following page)

Senator McClellan was instrumental in having the section inserted in the Senate bill. The report of the Senate Labor Committee states that the Committee followed three principles in acting on the bill:

> 1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents.
>
> 2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence.
>
> 3. Remedies for the abuses should be direct. Where the law prescribes standards, sanctions for their violation should also be direct. The committee rejects the notion of applying destructive sanctions to a union, i.e., to a group of working men and women, for an

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Footnote continued—

Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 829 (1960); *See also* Wollett, *Fiduciary Problems Under Landrum-Griffin*, 13 Annual Conference on Labor 267, 278-279; Smith, *The Labor-Management Reporting and Disclosure Act of 1959*, 46 Va. L. Rev. 195, 228 (1960).

offense for which the officers are responsible and over which the members have, at best, only indirect control. Still more important the legislation should provide an administrative or judicial remedy appropriate for each specific problem.

S. Rep. No. 187, 86th Cong., 1st Sess. 7 (1959), *reprinted in* I LEGISLATIVE HISTORY at 403.

The Senate debates specifically dealt with §501. In the course of the debates, the following colloquy occurred:

Mr. KENNEDY. Mr. President, I should like to ask the Senator from Arkansas a few questions.

Suppose an officer of a union expends money for an educational purpose, to advance what he and the other officers consider to be the interests of the union. Assume that there is nothing dishonest about the expenditure. It is not an expenditure for the purpose of taking money in a back-door deal. It is an honest expenditure for educational purposes, without any impropriety. Under the amendment of the Senator from Arkansas, would it be possible for a member to sue, on the argument that the educational purpose, which he does not like, is not really in keeping with the purposes of a labor organization? Could he take the case into court?

Mr. McCLELLAN. He might make such an allegation, and he might go to court. Each case must stand on its own merits. If the court found that the money was used for legitimate union purposes, for purposes which were proper under the constitution, and that it had been voted to authorize the use of money for educational purposes, I think it would come within the purview of the authority and right of the union officer. But, as my friend knows, the purpose

of this amendment is to get at those who organize an executive board of their own, whose members are all in cahoots. One says to the other, "I will keep you employed at a good salary and give you a good expense allowance. You just do what I want."

That sort of thing is being done. Union treasuries are being pilfered in that way. I believe that this is a good amendment.

* * * *

Mr. KENNEDY. * * *

Mr. President, what I am attempting to do is ascertain the purpose of the amendment. Is it the purpose of the amendment to insist that union officers who expend money shall not have a conflict of interest, and that they shall not attempt, through indirect means, to pilfer a union treasury for their own benefit? If so, in my opinion it would be a proper amendment.

Mr. McCLELLAN. That is exactly what I am trying to do. I have not had the opportunity to study the question as thoroughly as the Senator has done during the course of the hearings. However, I know that there have been flagrant and repeated abuses in this area.

* * * *

Mr. ERVIN. * * * We are under an obligation to see that the money is safely kept, to the end that it may be applied to duly authorized and legitimate union purposes.

Mr. KENNEDY. As I understand, the Senator from Arkansas holds that view also.

Mr. McCLELLAN. That is correct. If the Senator has any thought that I am trying to interfere with COPE, that is not correct. There may be amendments directed to that point, and to deal with that direct question. However, I am not offering my amendment on the direct question of political contributions. Everyone knows my views on that subject, I assume. This is not a drive at that situation. It is a drive at the skulduggery of some leaders when they meet in executive session and pay off this one and pay off that one.

105 Cong. Rec. 5856-5857 (1959), *reprinted in* II LEGISLATIVE HISTORY at 1130-1131.

In discussing the Conference Report, S. Doc. No. 51, 86th Cong., 1st Sess. (1959), the Senate observed that:

> The general principles stated in the bill are familiar to the courts, both State and Federal, and therefore incorporate a large body of existing law applicable to trustees, and a wide variety of agents. The detailed application of these fiduciary principles to a particular trustee, officer, or agent has always depended upon the character of the activity in which he was engaged. They bear upon a family trustee somewhat differently than a corporate director, upon an attorney quite differently than a real estate agent. The bill wisely takes note of the need to consider "the special problems and functions of a labor organization" in applying fiduciary principles to their officers and agents.
>
> The bill does not limit in any way the purposes for which the funds of a labor organization may be expended or the investments which can be made. Such decisions should be made by the members in accordance with the constitution and bylaws of their union.

> Union officers will not be guilty of breach of trust under this section when their expenditures are within the authority conferred upon them either by the constitution and bylaws, or by a resolution of the executive board, convention or other appropriate governing body—including a general meeting of the members—not in conflict with the constitution and bylaws. This is also made clear by the fact that section 501(a) requires that the special problems and functions of a labor organization be taken into consideration in determining whether union officers and other representatives are acting responsibly in connection with their statutory duties. The problems with which labor organizations are accustomed to deal are not limited to bread-and-butter unionism or to organization and collective bargaining alone, but encompass a broad spectrum of social objectives as the union may determine.

105 Cong. Rec. 16415 (1959), *reprinted in* II LEGISLATIVE HISTORY at 1433.

C.

The appellants' allegations pertaining to 18 U.S.C. §610 complicate the analysis but they do not change the result of the case. We first consider the appellants' request for future injunctive relief. At the outset, we note that the Federal Election Campaign Act Amendments of 1976, Pub. L. 94-283, May 11, 1976, repealed §610 and reenacted its substance at 2 U.S.C. §441b. Thus, when we speak of future injunctive relief, we must refer to §441b. In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court held that the Federal Election Campaign Act Amendments of 1974 relegated a shareholder's §610 claim for injunctive relief against corporate officers to the initial

review of the Federal Election Commission (FEC). The Court dismissed the shareholder's claim even though the complaint had been filed before the creation of the FEC. In *McNamara v. Johnston, supra,* the Seventh Circuit concluded that a union member's §501 claim for future injunctive relief was subject to the primary jurisdiction of the FEC as well insofar as it was premised on violations of §610. The same result obtains in this case under the 1976 amendments. Congress has explicitly expressed its desire to have the FEC engage in methods of conference, conciliation and persuasion before litigation ensues over any federal election laws. 2 U.S.C. §437g; S. Rep. No. 94-677, 94th Cong., 2d Sess. 1-2 (1976), *reprinted in* [1976] U. S. Code Cong. & Ad. News 929-930; H. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 45-50 (1976), *reprinted in* [1976] U. S. Code Cong. & Ad. News 960-965. We should not permit circumvention of such negotiation under the guise of a parallel cause of action. Thus, the claim for future injunctive relief must be dismissed for lack of jurisdiction.

The appellants also press a derivative claim for damages for the expenditures already made that allegedly violated §610. Four of the appellees, the appellants claim, devoted Community Action Program (CAP) funds to federal political campaigns. This fact alone does not establish a violation of §610. A 1972 amendment to §610 explicitly permitted the expenditure of funds for "the establishment, administration and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a * * * labor organization." This amendment was intended to codify preexisting law. *See Pipefitters Local Union No. 562 v. United States,* 407 U.S. 385, 408-412 (1972). Though the record on UAW contributions to federal campaigns is somewhat sketchy, it appears

that these donations did come from a "separate segregated fund" or at least from a fund intended to qualify as such under §610. The UAW's CAP structure is predominantly financed with regular dues, but it also includes a separate V CAP fund supported by voluntary contributions designated for political causes.[6] The appellants have introduced no evidence to indicate that any federal political contributions were made with general CAP funds, as opposed to V CAP funds. Since V CAP is separately funded, it is reasonable to infer that the UAW collectively thought those monies could legally be used for federal campaigns. The appellees, as agents, were entitled to rely on the union's grant of authority in making political contributions from the V CAP funds. As stated in *McNamara*:

> [Under the common law of fiduciary obligations, codified in §501,] it is * * * clear, and fundamental fairness requires, that as between agent and principal, an agent cannot be held liable for the use of the principal's property in an unlawful manner when it is reasonable to infer that the principal authorized the agent's conduct.

522 F.2d at 1165 (Footnote omitted).

Of course, as pointed out by the *McNamara* opinion, apparent authority does not immunize union officials from the

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6. The 1972 UAW Constitution, Article 12, Section 20, for example, provides:

> The International Executive Board shall create and operate a Political Action Committee to be known as UAW Voluntary Community Action Program Committee (UAW V. CAP). This Committee shall be authorized to make policy decisions concerning expenditures and contributions involving federal elections and to make expenditures and contributions from a fund established by voluntary contributions from UAW members, their families and friends * * *.

As noted below, we do not hold that the V CAP Councils are "segregated fund[s]" within the meaning of 22 U.S.C. §441b. We merely hold that it is reasonable to infer that the CAP structure if intended to comply with that statute.

criminal sanctions of §610, or the enforcement provisions flowing from §441b, upon a showing that V CAP is in some respects deficient.

There is no evidence in the record to indicate anything but that the appellees relied on their apparent authority. There is no evidence that would justify an inference that the appellees did not comply with the requirements of their constitution. Nor is there any evidence to the effect that any of the appellees knew or suspected that their constitution made any but adequate provision for the requirements of §610. On this record, we think summary judgment for the appellees was justified.[7]

We do not hold that the UAW's CAP structure satisfied the "segregated fund" requirements of §610 in the years relevant to the damage claims, or that it presently satisfies 2 U.S.C. §441b. That issue is not before us. Insofar as the appellants intend to challenge the validity of the CAP structure, as opposed to a claim that particular officers violated their duty to the union, they press claims against the union, which are not cognizable under a §501 derivative action.

We affirm in part and reverse in part the dismissal of the §201 claim. We affirm the dismissal of the §501 claim. We remand the case for for further proceedings consistent with this opinion.

ROSS, Circuit Judge, Dissenting.

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7. We do not hold that violations of 18 U.S.C. §610, and of its successor statute 2 U.S.C. §441b, can never amount to a violation of §501. Insofar as it is not reasonable to infer that a given donation was authorized, we think there is a remedy under §501 for violations of federal election laws. *Cf. Miller v. American Telephone & Telegraph Co.*, 507 F.2d 759 (3rd Cir. 1974). We merely hold that apparent authority, if relied on in good faith, is a defense to liability under §501. *See McNamara v. Johnston*, 522 F.2d 1157, 1163 (7th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976).

COUNT II

I would reverse the dismissal of appellants' section 501 claim, because I do not agree that as a matter of law the challenged expenditures were "clearly authorized" by the UAW constitution.

By dismissing the section 501 claim at this stage of the proceedings,[1] the majority in effect confers unlimited discretion upon UAW International officers in their expenditure of the huge amounts of money collected annually from the union membership.[2] In my opinion, the UAW

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1. Although treated as a summary judgment because matters outside the pleadings were considered, Count II was dismissed for failure to state a claim. *See* FED. R. CIV. P. 12(b). We therefore review the dismissal in light of the following standards:

> [A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. * * *
>
> [A] complaint should not be dismissed merely because a plaintiff's allegations do not support the particular legal theory he advances, for the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory. Nor should a complaint be dismissed that does not state with precision all elements that give rise to a legal basis for recovery. Finally, a complaint should not be dismissed merely because the court doubts that a plaintiff will prevail in the action. That determination is properly made on the basis of proof and not merely on the pleadings.
>
> The question, therefore, is whether in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Thus, as a practical matter, a dismissal under Rule 12(b)(6) is likely to be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.

Jackson Sawmill Co. v. United States, 580 F.2d 302, 306 (8th Cir.) (citations omitted), *petition for cert. filed*, 47 U.S.L.W. 3278 (U.S. Oct. 24, 1978) (No. 75-585).

2. The record reflects that the combined dues income of the International and Local unions for the years 1969, 1970 and 1971 averaged $148,409,826.00 per year.

constitution does not grant completely unfettered discretion to the officers in their expenditures of union funds.[3]

The UAW's objectives as set forth in Article 2 of its constitution include improving working conditions, seeking election of candidates and passage of legislation "in the interests of all labor," working for repeal of laws "unjust to labor," obtaining unemployment insurance, engaging in political and other activities "which further, directly or indirectly, the joint interests of the membership * * * in the improvement of general economic and social conditions," and assisting organizations "having purposes and objectives *similar or related*" to those of the UAW. (Emphasis supplied.)

Article 7(2) authorizes expenditure of UAW funds to achieve these purposes and objectives "not inconsistent therewith" and purposes the Executive Board believes "will further *the general interest and welfare of the membership.*" (Emphasis supplied.)

Article 23(1) indicates that the function of the UAW Community Action Program is *"to improve the economic and social conditions of UAW members and their families and to promote the general welfare and democratic way of life for all people."* (Emphasis supplied.)

I do not consider the above-quoted language meaningless or superfluous. The union constitution clearly contemplates a relationship of some kind between the use of union funds and the interests and welfare of the union membership. Had the contested contributions been made

3. Any resolution passed by the governing officers which conflicted with the provisions of the UAW constitution or exceeded the powers conferred therein would be invalid and could not be relied upon as authority for expenditures of union funds. *Highway Truck Drivers and Helpers, Local 107 v. Cohen*, 284 F.2d 162, 164 (3d Cir. 1960), *affirming*, 182 F.Supp. 608, 616-22 (E.D. Pa. 1960).

to foreign governments, terrorist organizations or groups seeking destruction of the "democratic way of life," none of the avowed objectives of the UAW would have been served and the donations clearly would not have been authorized.

Appellants assert in Count II that appellees have contributed union assets "to various organizations and groups espousing and promoting ideological doctrines and causes *totally unrelated to, and in many instances antithetical to,* the interests and welfare of the union and its members." The complaint lists thirteen organizations as recipients of these union funds as heretofore set forth in the majority opinion.

Because appellants were denied discovery and an opportunity to prove their claim, the record does not reflect the goals and methods espoused by the recipients of the challenged UAW contributions. If the ends and means adopted by these organizations were, as alleged, antithetical to the interests and welfare of the UAW membership and inconsistent with the objectives of the UAW, I believe appellants have a cause of action under section 501 for misuse of union funds by UAW officers.

Both the majority and the panel of the Seventh Circuit in *McNamara v. Johnston,* 522 F.2d 1157 (7th Cir. 1975), *cert. denied,* 425 U.S. 911 (1976), pay lip service to the requirement that union funds be spent as authorized by the constitution, bylaws or appropriate convention resolution. But they ignore the allegation of appellants that the questioned expenditures *were in violation* of the union's constitution since they were alleged to be not "in the interests of all labor" or "which further, directly or indirectly, the joint interests of the membership * * *" or in "the general interest and welfare of the membership." It is upon this aspect of the case that I have attempted

to focus my dissent and the aspect thereof which the majority has all but ignored.

Judge Stephenson and Judge Henley join in this dissenting opinion.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

ORDER

(Filed in U.S. District Court December 29, 1976)

This motion is before the Court on a separate motion of plaintiffs to disqualify the following counsel from representing the individual defendants in this action:

(a) Stephen I. Schlossberg, who is General Counsel of International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and any others who have represented said UAW International Union, of which plaintiffs are members;

(b) Youngdahl, Brewer, Forster, Huckabay and Uhlig, and James E. Youngdahl, which firm and attorney are Regional Counsel for the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America;

(c) Morris J. Levin, who has been retained as local counsel by the above-named General Counsel Schlossberg herein, and who has thus been retained to represent the said labor organization, or Local 25 thereof; and

(d) Any other attorney (or firm of attorneys with a member thereof) who now represents, or who has previously represented, the said International UAW labor organization, or Local 25, or any subdivision or alter ego thereof.

The grounds relied on by plaintiffs in their motion to disqualify counsel are applicable only to the Section 501 action of Count II. Count I is not mentioned in plaintiffs' motion or the brief in support of the motion. If

Count I were the sole basis for this suit, plaintiffs' motion would require little discussion. It has been held that a Section 201 suit may be brought against officials of a union without joining the union as a party. *Rekant* v. *Rabinowitz,* 194 F. Supp. 194 (E.D. Pa. 1961). This holding is also applicable to §301 suits since §201(c) is made applicable by §301(b) to reports filed under §301(a). However, it is clear on the face of §201(c) that, in an action brought under §201 or §301, this Court only has jurisdiction over officials in their capacity as officers and not over the officials as individuals. This being the case, it is permissible for a union to supply counsel for defendant officers in a suit brought pursuant to §201(c).

With respect to Count II, a Section 501 action, in *McNamara* v. *Johnston,* likewise a Section 501 action, 522 F. 2d 1157-67 (Cert. denied 425 U. S. 911), the Court had this to say:

> "Union officials charged as defendants in suits of this nature should retain independent counsel and bear the financial burden of their defense. Then, if they prevail, they may properly be reimbursed by the union for the costs of their legal defense. (See Holdeman v. Sheldon, 311 F. 2d 2, 3 (2nd Cir. 1962), aff'g 204 F. Supp. 890, 895 (S.D. N.Y.)"

Accordingly, this motion would be sustained except for the prior ruling of this Court dismissing Count II for failure to state a cause of action. In view of such prior ruling the motion is stricken, having been made moot by such ruling.

/s/ Roy W. Harper
U. S. District Judge

ORDER

(Filed in U.S. District Court December 29, 1976)

This matter is before the Court on a separate motion of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) and its Local 25, to intervene.

Rule 24(c), Federal Rules of Civil Procedure, requires that a motion to intervene "shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

The proposed intervenors' memorandum in support of the motion to intervene states: "As required by Rule 24(c), we submit herewith a copy of UAW's motion to dismiss as the 'pleading setting forth the * * * defense for which intervention is sought.' "

A motion to dismiss is not a pleading. Therefore, Rule 24(c) has not been complied with and the motion to intervene is denied.

/s/ Roy W. Harper
U. S. District Judge

MEMORANDUM AND ORDER

(Filed in U.S. District Court December 29, 1976)

This action was brought by plaintiffs, citizens of Missouri, and members of the UAW and Local 25, against defendants, who are officers, agents and representatives of UAW. The complaint states that defendant Woodcock is President of UAW; defendant Mazey is Secretary-Treasurer of UAW; defendant Worley is Director of UAW Region 5, Chairman of UAW Region 5 Community Action

Program Council, and Administrator of the Chevrolet unit of UAW Local 25; defendant Mattix is Assistant Director of UAW Region 5, and Assistant Administrator of the Chevrolet unit of Local 25; defendant Lavin is President of UAW Local 25; defendant Webster is Recording Secretary of UAW Local 25; defendant Hartzell is Financial Secretary of UAW Local 25; and defendant Young is Financial Secretary of UAW Region 5 CAP Council, and Financial Secretary-Treasurer of the Greater St. Louis UAW CAP Council.

The complaint contains two counts. In Count I jurisdiction is alleged under Section 201(c) and Section 301(a) and (b) of the Labor Management Reporting and Disclosure Act (LMRDA), 29 USC 431(c) and 461(a) and (b). Plaintiffs allege, in part, in Count I that on or about June 12, 1970, defendants Woodcock and Mazey, acting through the International Executive Board of UAW, imposed an administratorship over the Chevrolet unit of Local 25, thereby displacing the authority of the duly elected officers of said local. Defendants Worley and Mattix were designated as Administrator and Assistant Administrator, respectively, and proceeded to assume control and exercise authority over the affairs of the aforesaid Chevrolet unit, together with all of the money and assets of said unit. Plaintiffs further allege in Count I that defendants Woodcock, Mazey, Worley and Mattiz were obligated to file a report pursuant to the provisions of Section 301(a), and the other defendants were obligated to file a report pursuant to the provisions of Section 201(c).

Plaintiffs in Count I seek under 201(c) and 301(a) and (b) to examine books, records and accounts for the years 1967, 1968, 1969 and 1970, necessary to verify the two types of reports. They wish to verify the reports filed by Local 25 pursuant to 201(b) and to verify the

reports filed by the UAW pursuant to Section 301(a). In Count I plaintiffs pray the Court to enter an order requiring defendants to make available to plaintiffs, and such attorneys and accountants as may be designated by plaintiffs, all of the records and documents as set out in a letter attached to the complaint for the years 1967, 1968, 1969 and 1970.

Count II is an action brought by the plaintiffs pursuant to the Labor Management Reporting and Disclosure Act (popularly referred to as the Landrum-Griffin Act, Section 501, 29 USC) against union officers for breach of fiduciary duty in accordance with general resolutions and the Union constitution authorizing contribution of Union funds to political candidates in social causes.

Plaintiffs pray in Count II, among other things, that the Court issue an order enjoining defendants in their capacities as officers or representatives of Local 25 or the International Union, from making any expenditures for partisan political activities or for support of ideological causes or organizations or groups espousing ideological causes from the duties and fees paid in by plaintiffs and other employees of the General Motors Chevrolet Assembly Plant under and through the compulsory members requirements.

This matter is before the Court on defendants' motion to dismiss.

The basis for dismissal under Count I is:

A): Venue is improper;

B): Failure to state a claim upon which relief can be granted because plaintiffs failed to meet the just cause and specificity requirements of §201(c) of the Labor Management Reporting and Disclosure

Act, 29 USC 431(c), under which jurisdiction is alleged; and

C): This action is, in part, barred by the statute of limitations.

The basis for dismissal under Count II is:

A): Failure to state a claim upon which relief can be granted under §501 of the Labor Management Reporting and Disclosure Act, 29 USC 501, under which jurisdiction is alleged; and

B): This action is, in part, barred by the statute of limitations.

Plaintiffs bring suit not against the UAW or Local 25, but instead against certain officers of these unions, which is permissible. Section 201(c) contains a clause pertaining to venue which provides that "[E]very such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any state court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office to permit such member for just cause to examine any books, records and accounts necessary to verify such report."

Defendants concede that venue is proper as to plaintiffs' demands to examine the records necessary to verify the reports filed by Local 25 pursuant to 201(b). Defendants contend, however, that venue is improper as to plaintiffs' demands to the records necessary to verify the report filed pursuant to 301(a) by the UAW, whose principal office is not located in this district. As this Court reads 201(c), since the UAW was the organization required to file a report by 301, a suit for the records necessary to

verify this report could only have been brought against the UAW or its officers and could not have been brought against Local 25 or its officers, even though the report concerned the financial condition of Local 25. A suit under 201(c) cannot be brought against the UAW in this Court since venue would be improper. Regardless of the wisdom of the venue provisions of 201(c), plaintiffs* cannot avoid these provisions by bringing suit against the officers of the UAW instead of the UAW itself.

Therefore, that portion of Count I which relates to the report filed by the UAW pursuant to 301(a) should be dismissed for improper venue or transferred to the proper district, whereas that part of Count I which seeks records before the administratorship was imposed on Local 25 would be proper before this Court as against the officers of Local 25, as it has been held that a section 201 suit may be brought against officers of a union without naming the union as a party. *Rekant* v. *Rabinowitz*, 194 F. Supp. 194 (E.D. Pa. 1961). This holding is also applicable to section 301 suits since 201(c) is made applicable by 301(b) to reports filed under 301(a). However, it is clear on the face of 201(c) that, in an action brought under 201 or 301, this Court only has jurisdiction over officials in their capacity as officers and not over the officials as individuals.

Furthermore, until amended pleadings are filed for that part of Count I over which this Court has venue, the question of the statute of limitations cannot be resolved. With respect to the contention of defendants that Count I should be dismissed for failure to state a claim upon which relief can be granted, there is no merit. *Springfield*

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*Original memorandum had word "defendant" here, but this was changed to "plaintiff" by direction of Judge Harper's letter to counsel dated February 9, 1977.

Television, Inc. v. *City of Springfield, Mo.*, 428 F. 2d 1375 (8th Cir. 1970), *Lewis* v. *Chrysler Motors Corp.*, 456 F. 2d 605 (8th Cir. 1972).

Accordingly, the defendants' motion to dismiss Count I is sustained on the basis set out above, and plaintiffs are given twenty (20) days within which to file an amended petition in line with this memorandum.

With respect to Count II, the briefs of the parties indicate similar suits involving this same question have been filed against the defendants in several districts around the country. An examination of *McNamara* v. *Johnston*, 522 F. 2d 1157 (7th Cir. 1974), discloses that case to be one on all fours with Count II of this action, except for some of the named parties. It would be repetitious for this Court to deal with the question here. Suffice it to say that the district court dismissed the complaint for failure to state a claim (369 F. Supp. 517), the Seventh Circuit Court of Appeals affirmed, and the Supreme Court denied certiorari (425 U. S. 911).

Accordingly, the defendants' motion to dismiss Count II for failure to state a claim upon which relief can be granted under Section 501 of the Labor Management Reporting and Disclosure Act, 29 USC 501, is sustained.

/s/ Roy W. Harper
U. S. District Judge

ORDER

(Filed in U.S. District Court January 19, 1977)

Plaintiffs having failed to file a petition amending Count I of their complaint within the twenty (20) days granted in this Court's Order dated December 29, 1976, and the defendants' motion to dismiss Count II of plaintiffs' complaint having been sustained;

IT IS HEREBY ORDERED AND ADJUDGED that Count I of plaintiffs' complaint be and the same is hereby dismissed without prejudice, and,

IT IS FURTHER ORDERED AND ADJUDGED that Count II of plaintiffs' complaint be and the same is hereby dismissed.

/s/ Roy W. Harper
United States District Judge

Dated this 19th day
of January, 1977.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1978
No. 77-1094

Ernest Gabauer; Joe Delos Santos, Jr.; Coleman, G. Lewis, Jr.; C. L. Greenfield; Elbert Hill and Claude J. Huskey,
Appellants,

vs.

Leonard Woodcock; Emil Mazey; Kenneth Worley; C. E. Mattix; Edward Lavin; John T. Webster; Roy Hartzell and Donald Young,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

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JUDGMENT

(Filed March 6, 1979)

This cause came on to be heard on the record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties and was argued by counsel.

On Consideration Whereof it is now here ordered and adjudged by this Court that the judgment of the said District Court as to the dismissal of the §501 claim be affirmed; and as to the dismissal of the §201 claim be and is hereby affirmed in part and reversed in part.

And it is further ordered by this Court that this cause be and is hereby remanded to the said District Court for further proceedings consistent with the majority opinion of this Court.

March 6, 1979

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1978
77-1094

Ernest Gabauer, et al.,
Appellants,

vs.

Leonard Woodcock, et al.,
Appellees.

Appeal from the United States District Court for the Eastern District of Missouri

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The Court having considered petition for rehearing en banc filed by counsel for appellants and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

March 27, 1979

APPENDIX E

TITLE II—REPORTING BY LABOR ORGANIZATIONS, OFFICERS AND EMPLOYEES OF LABOR ORGANIZATIONS, AND EMPLOYERS

Report of Labor Organizations

(29 U.S.C. 431)

Sec. 201. (a) Every labor organization shall adopt a constitution and bylaws and shall file a copy thereof with the Secretary, together with a report, signed by its president and secretary or corresponding principal officers, containing the following information—

(1) the name of the labor organization, its mailing address, and any other address at which it maintains its principal office or at which it keeps the records referred to in this title;

(2) the name and title of each of its officers;

(3) the initiation fee or fees required from a new or transferred member and fees for work permits required by the reporting labor organization;

(4) the regular dues or fees of other periodic payments required to remain a member of the reporting labor organization; and

(5) detailed statements, or references to specific provisions of documents filed under this subsection which contain such statements, showing the provisions made and procedures followed with respect to each of the following: (A) qualifications for or restrictions on membership, (B) levying of assessments, (C) participation in insurance or other benefit plans, (D)

authorization for disbursement of funds of the labor organization, (E) audit of financial transactions of the labor organization, (F) the calling of regular and special meetings, (G) the selection of officers and stewards and of any representatives to other bodies composed of labor organizations' representatives, with a specific statement of the manner in which each officer was elected, appointed, or otherwise selected, (H) discipline or removal of officers or agents for breaches of their trust, (I) imposition of fines, suspensions, and expulsions of members, including the grounds for such action and any provision made for notice, hearing, judgment on the evidence, and appeal procedures, (J) authorization for bargaining demands, (K) ratification of contract terms, (L) authorization for strikes, and (M) issuance of work permits. Any change in the information required by this subsection shall be reported to the Secretary at the time the reporting labor organization files with the Secretary the annual financial report required by subsection (b).

(b) Every labor organization shall file annually with the Secretary a financial report signed by its president and treasurer or corresponding principal officers containing the following information in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year—

(1) assets and liabilities at the beginning and end of the fiscal year;

(2) receipts of any kind and the sources thereof;

(3) salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000 in the

aggregate from such labor organization and any other labor organization affiliated with it or with which it is affiliated, or which is affiliated with the same national or international labor organization;

(4) direct and indirect loans made to any officer, employee, or member, which aggregated more than $250 during the fiscal year, together with a statement of the purpose, security, if any, and arrangements for repayment;

(5) direct and indirect loans to any business enterprise, together with a statement of the purpose, security, if any, and arrangements for repayment; and

(6) other disbursements made by it including the purposes thereof;

all in such categories as the Secretary may prescribe.

(c) Every labor organization required to submit a report under this title shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty enforceable at the suit of any member of such organization in any State court of competent jurisdiction or in the district court of the United States for the district in which such labor organization maintains its principal office, to permit such member for just cause to examine any books, records, and accounts necessary to verify such report. The court in such action may, in its discretion, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

* * *

TITLE III—TRUSTEESHIPS

Reports

(29 U.S.C. 461)

Sec. 301. (a) Every labor organization which has or assumes trusteeship over any subordinate labor organization shall file with the Secretary within thirty days after the date of the enactment of this Act or the imposition of any such trusteeship, and semiannually thereafter, a report, signed by its president and treasurer or corresponding principal officers, as well as by the trustees of such subordinate labor organization, containing the following information: (1) the name and address of the subordinate organization; (2) the date of establishing the trusteeship; (3) a detailed statement of the reason or reasons for establishing or continuing the trusteeship; and (4) the nature and extent of participation by the membership of the subordinate organization in the selection of delegates to represent such organization in regular or special conventions or other policy-determining bodies and in the election of officers of the labor organization which has assumed trusteeship over such subordinate organization. The initial report shall also include a full and complete account of the financial condition of such subordinate organization as of the time trusteeship was assumed over it. During the continuance of a trusteeship the labor organization which has assumed trusteeship over a subordinate labor organization shall file on behalf of the subordinate labor organization the annual financial report required by section 201(b) signed by the president and treasurer or corresponding principal officers of the labor organization which has assumed such trusteeship and the trustees of the subordinate labor organization.

(b) The provisions of section 201(c), 205, 206, 208, and 210 shall be applicable to reports filed under this title.

(c) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(d) Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any report required under the provisions of this section or willfully makes any false entry in or willfully withholds, conceals, or destroys any documents, books, records, reports, or statements upon which such report is based, shall be fined not more than $10,000 or imprisoned for not more than one year, or both.

(e) Each individual required to sign a report under this section shall be personally responsible for the filing of such report and for any statement contained therein which he knows to be false.

Purposes for Which a Trusteeship May Be Established

(29 U.S.C. 462)

Sec. 302. Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of correcting corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization.

Unlawful Acts Relating to Labor Organization Under Trusteeship

(29 U.S.C. 463)

Sec. 303. (a) During any period when a subordinate body of a labor organization is in trusteeship, it shall be unlawful (1) to count the vote of delegates from such body in any convention or election of officers of the labor organization unless the delegates have been chosen by secret ballot in an election in which all the members in good standing of such subordinate body were eligible to participate or (2) to transfer to such organization any current receipts or other funds of the subordinate body except the normal per capita tax and assesments payable by subordinate bodies not in trusteeship: *Provided*, That nothing herein contained shall prevent the distribution of the assets of a labor organization in accordance with its constitution and bylaws upon the bona fide dissolution thereof.

(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both

Enforcement

(29 U.S.C. 464)

Sec. 304. (a) Upon the written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions of this title (except section 301) the Secretary shall investigate the complaint and if the Secretary finds probable cause to believe that such violation has occurred and has not been remedied he shall, without disclosing the identity of the complainant, bring a civil action in any district court of the United States having jurisdiction of the labor

organization for such relief (including injunctions) as may be appropriate. Any member or subordinate body of a labor organization affected by any violation of this title (except section 301) may bring a civil action in any district court of the United States having jurisdiction of the labor organization for such relief (including injunctions) as may be appropriate.

(b) For the purpose of actions under this section, district courts of the United States shall be deemed to have jurisdiction of a labor organization (1) in the district in which the principal office of such labor organization is located, or (2) in any district in which its duly authorized officers or agents are engaged in conducting the affairs of the trusteeship.

(c) In any proceeding pursuant to this section a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution or bylaws shall be presumed valid for a period of eighteen months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 302. After the expiration of eighteen months the trusteeship shall be presumed invalid in any such proceeding and its discontinuance shall be decreed unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under section 302. In the latter event the court may dismiss the complaint or retain jurisdiction of the cause on such conditions and for such period as it deems appropriate.

* * *

TITLE V—SAFEGUARDS FOR LABOR ORGANIZATIONS

Fiduciary Responsibility of Officers of Labor Organizations

(29 U.S.C. 501)

Sec. 501. (a) The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder, to refrain from dealing wich such organization as an adverse party or in behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization. A general exculpatory provision in the constitution and bylaws of such a labor organization or a general exculpatory resolution of a governing body purporting to relieve any such person of liability for breach of the duties declared by this section shall be void as against public policy.

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after

being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

(c) Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of a labor organization of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

* * *

Retention of Rights Under Other Federal and State Laws

(29 U.S.C. 523)

Sec. 603. (a) Except as explicitly provided to the contrary, nothing in this Act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Act shall take away any

right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State.

(b) Nothing contained in titles I, II, III, IV, V, or VI of this Act shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in said titles (except section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended.

Effect on State Laws

(29 U.S.C. 524)

Sec. 604. Nothing in this Act shall be construed to impair or diminish the authority of any State to enact and enforce general criminal laws with respect to robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, or assault which inflicts grievous bodily injury, or conspiracy to commit any of such crimes.

TITLE 18

UNITED STATES CODE ANNOTATED

§ 610. Contributions or expenditures by national banks, corporations or labor organizations

It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make

a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section.

Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than $5,000; and every officer or director of any corporation or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, and any person who accepts or receives any contribution, in violation of this section, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if the violation was willful, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

For the purposes of this section "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exist for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section; but shall not include communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject; nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and their families, or by a labor organization aimed at its members and their families; the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation or labor organization: *Provided,* That it shall be unlawful for such a fund to make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other monies required as a condition of membership in a labor organization or as a condition of employment or by monies obtained in any commercial transaction.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1873

ERNEST GABAUER, *et al.*,
Petitioners,

v.

LEONARD WOODCOCK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS

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Respondents Woodcock, Mazey, Worley, Mattix, Lavin, Webster, Hartzell and Young, by counsel, respectfully pray that the Court *deny* the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is reported at: *Gabauer et al.* v. *Woodcock et al.*, 594 F.2d 662 (8th Cir. 1979) (*en banc*),[1] *affirming in part and reversing in part*, 425 F. Supp. 1 (E.D. Mo. 1976).

[1] The unpublished panel opinion was withdrawn. 594 F.2d 662, 664 n.1. (Pet. App. at 30) The Appendices to the Petition will be cited in the form "Pet. App. at ——."

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Petitioners urge the expansion of federal jurisdiction by transmuting § 501(a) & (b) of the LMRDA [2] into a vehicle by which an individual union member can impose derivative damages on, and secure injunctive relief against officers for certain expenditures, even though those expenditures were authorized by the governing bodies of the organization.

Did the Eighth Circuit, *en banc*, following the Seventh Circuit's *McNamara* v. *Johnston*, 522 F. 2d 1157 (7th Cir. 1975) *cert. den.* 425 U.S. 911 (1976), correctly *refuse* such an expansion of federal jurisdiction?

II

International Union officials are sued, under § 201(c) of the LMRDA,[3] in St. Louis, far from Detroit, where the International Union "maintains its principal office." Various officials of St. Louis Local Unions are also sued. All object to venue. Did the Court below properly remand as to records in the control of the St. Louis officials, while affirming dismissal as to those in the control of the Detroit officials?

COUNTERSTATEMENT OF THE CASE

This is the last of two companion cases, sponsored by the same group,[4] premised on the same theory, and directed at the same end. The theory is that federal jurisdiction should be expanded by transmuting § 501(a) & (b) of the LMRDA into a vehicle by which an individual union member can impose derivative damages on, and secure injunctive relief against officers for certain expenditures, even though those expenditures were authorized by the governing bodies of the organization. The target of this effort is the UAW's Community Action Program (CAP). *McNamara* v. *Johnston*, 522 F.2d 1157, 1163 (7th Cir. 1975), *cert. den.* 425 U.S. 911 (1976), was directed against the Illinois CAP. The instant case is directed against Missouri CAP. The Seventh and Eighth Circuits reached the same conclusion.

[2] Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 401-531, § 501(a) & (b), commonly known as "Landrum-Griffin." (Pet. App. at 77-8).

[3] 29 U.S.C. § 431(c) (1975). (Pet. App. at 72).

[4] *See: UAW* v. *Nat. Right to Work Legal Defense & Ed. Foundation*,—F. Supp—(D.D.C. 1978), 95 L.R.R.M. 2584, 2586-7, *aff'd in part, vacated in part & remanded*, 590 F.2d 1139 (D.C. Cir. 1978).

Facts

The 1968 UAW Convention gave the International Executive Board (IEB) authority to establish a national, state and local CAP structure to replace the soon-to-be-terminated relationship with the AFL-CIO's COPE program. The IEB thereafter established a CAP structure, which has since been ratified by the UAW Convention. 594 F.2d at 668-9 (Pet. App. 42) *See*: UAW Constitution (1977), Art. 23. Under this structure, state and local CAP Councils were established in, among other places, Illinois and Missouri. The defendants-respondents here are the various elected officials of the St. Louis and Missouri CAP Councils, as well as of the International Union. (Pet. at 4 n.3). In *McNamara*, the defendants held analogous positions. 522 F.2d at 1158-9.

The regular UAW CAP structure is financed by 3% of monthly dues. Expenditures are made by vote of elected delegates to each CAP Council, or, between meetings, by the elected executive bodies of the Council. Any UAW member who dissents from this use of his dues has a right under Article 16 § 7 of the UAW Constitution to obtain a pro-rata rebate which includes the 3%

of dues alloted to CAP, as well as other expenditures for political or ideological purposes. 594 F.2d at 668-669, *incl.* n.4 (Pet. App. at 42), *compare McNamara*, 522 F.2d at 1164, 1166 n.11.

The regular CAP structure deals with community service, as well as state and local political issues. A separate, segregated fund—UAW Voluntary CAP—handles federal elections. 594 F.2d at 673-4 (Pet. App. at 52-4).[5]

Proceedings Below

Disagreeing with the UAW Constitution and Convention, the petitioners filed suit under § 501(a) & (b) of the LMRDA, 29 U.S.C. § 501(a) & (b), seeking injunctive relief forbidding the organization's officers from spending funds for "partisan political activities or . . . ideological causes" with which these particular plaintiffs disagree, and derivative damages from these officials for expenditures of this sort. 594 F.2d at 667-8 (Pet. App. at 39-40). *Compare*: *McNamara*, 522 F.2d at 1162. This is Count II of the Complaint. Count I prays for the inspection of certain records, some in Detroit and some in St. Louis. Count I is premised on § 201(c) of the LMRDA, 29 U.S.C. § 461(c) (1975).[6]

[5] This is to comply with the Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431-455 (1976), *esp.*, § 441b. While this case has been in litigation, Congress also passed 26 U.S.C. § 527 (1975), adjusting the taxability of entities like CAP, even where their activities are exclusively non-federal. In response, the UAW, like many organizations, has further segregated community service expenditures from state/local "exempt function" (*i.e.*, political) expenditures. The former continue to be handled by CAP. For the latter, a similar, but segregated "PAC" structure has been established. During the time in question in this case, however, CAP handled both community service and state/local political expenditures.

[6] We need not discuss the welter of collateral claims mentioned in the Petition, as none are of significance or relevance. The short answer is in the Eighth Circuit's own recitation, 594 F.2d at 664-6 (Pet. App. 30-35). Many of these red herrings are rooted in Gabauer's and Huskey's removal from office for gerry-mandering and misappropriation of union funds. They lost these issues in earlier litigation. *See: Gabauer* v. *Woodcock*, 520 F.2d 1084 (8th Cir. 1975), *cert. den.* 423 U.S. 1061 (1976); and *Huskey* v. *Woodcock*, 520 F.2d 1096 (8th Cir. 1975), *cert. den.*, 423 U.S. 1061 (1976). A review of these decisions is, perhaps, useful as background.

The District Court dismissed the § 501 claim (Count II) for failure to state a claim, following *McNamara* v. *Johnston*, 522 F.2d 1157 (7th Cir. 1975), *cert. den.* 425 U.S. 911 (1976). Recognizing the venue problem as to Detroit records, the District Court dismissed Count I with leave to refile as to the St. Louis records. 425 F. Supp. 1, 5 (E.D. Mo. 1976). (Pet. App. at 64-6). Petitioners refused to refile the § 201(c) claim (Count I).

On appeal, the panel affirmed as to the § 501 claim, agreeing that *McNamara* should be followed.

As to the § 201(c) claim, it affirmed as to the Detroit records, since the International Union's "principal office" was there. However, it reversed as to the St. Louis records, holding that the District Court should not have dismissed.

The Eighth Circuit reheard the § 501 claim (Count II) *en banc*. The § 201(c) claim (Count I) was not reheard, and the full Court followed the panel decision—affirming the dismissal of the International Union's Detroit officials for improper venue, since its "principal office" was not in St. Louis; reversing and remanding as to St. Louis records, since Local 25's "principal office" was in the Eastern District of Missouri.

On the § 501 issue (Count II) the full Court affirmed dismissal, as had the panel, following the Seventh Circuit's *McNamara* decision. 594 F.2d at 668-674 (Pet. App. at 41-54). The dissent, authored by Judge Ross, argued that dismissal was not appropriate, and a remand should be had to inquire into whether the expenditures

in question were "antithetical" to the interests of the membership. 594 F.2d at 674-6 (Pet. App. 54-8). The majority of the Eighth Circuit, agreeing with the Seventh, held that Congress did not intend § 501 as a vehicle for that sort of inquiry, at least in the circumstances of this case.

ARGUMENT

As to the § 501 claim, the Eighth Circuit rejected petitioners' arguments, expressly agreeing with the Seventh Circuit[7] using the following straight-forward, restrained analysis:

> Congress, as evinced by both the language of § 501 and its legislative history, intended that section to incorporate the common law approach to fiduciary responsibility. The Complaint is devoid of allegations of adverse dealing, personal gain, disobedience of the principal and other such conduct. In the UAW's case, there is specific authorization from the principal for the conduct of which petitioners complain. So, under the established rules of agency, the agent officers cannot be held derivatively liable for the use of the organization's property, even in an unlawful manner, since the principal authorized the agent's conduct.[8] Petitioners' contention that the UAW Constitution and Resolutions are "exculpatory," is rejected by a quotation of *McNamara*:

[7] "We believe that the trial court properly followed *McNamara* v. *Johnston*, 522 F.2d 1157 (7th Cir. 1975), cert. den. 425 U.S. 911 . . . (1976), and correctly held that the appellees did not breach their fiduciary duty by making the questioned expenditures." 594 F.2d at 668 (Pet. App. at 41).

[8] This is consistent with the Eighth Circuit's own holdings that, if the officials had refused to make authorized expenditures for social or political purposes, the disobedience would subject them to suit under § 501(b). *Johnson* v. *Nelson*, 325 F.2d 646 (8th Cir. 1963); *Pignotti* v. *Sheet Metal Workers*, 477 F.2d 825 (8th Cir. 1973); and *Bright* v. *Taylor*, 554 F.2d 854 (8th Cir. 1977).

> "Section 501 was intended to follow the 'well-established distinction between conferring authority upon an agent or trustee, which is permissible and protects him against liability, and attempting to excuse breaches of trust, which is here made void as against public policy.' H.R. Rep. No. 741, 86th Cong., 1st Sess. 81-82, U.S. Code Congressional and Administrative News, 2480 (1959). Without doubt, the provisions and resolutions upon which the UAW relies fall within the former category of measures that confer authority." [*McNamara*, 522] at 1164
>
> We agree with that disposition. [*Gabauer* v. *Woodcock*, 504 F.2d 662, 670 (8th Cir. 1979) (*en banc*) (Pet. App. at 44-5)]

Examining the legislative history, both Circuits found that Congress had disavowed any intent to prohibit union involvement in politics. Like the Seventh Circuit, the Eighth concluded that: "Without express authorization of Congress, we cannot take unto ourselves the role of deciding which causes a union can or cannot support." 594 F.2d at 670 (Pet. App. at 45).

There is, in short, no split of the Circuits. There is complete agreement, expressed in cases which are, in every respect, identical. There is agreement on the analysis of the statute, on the intent of Congress, and on both the impropriety of and the dangers of expanding federal jurisdiction in this area.

Petitioners' arguments, shorn of their conclusory fur, are simply that—regardless—the judiciary should be turned to these purposes, especially on a motion to dismiss. But, even on petitioners' and the dissent's assumptions, suffice it to observe that what is, and is not appropriate to treatment "on the papers" is best left to the Circuits. This Court has rightly been reluctant to review such a work-a-day issue.

As for the § 201(c) claim (Count I), there is hardly anything to review. The Court of Appeals, for the most part, reversed—holding that the Complaint should be reinstated as to St. Louis records. Petitioners won these issues before the Court of Appeals. All they lost was their claim against the International Union and its Detroit records. But that result is so obviously correct as to not merit revisitation. The International Union's headquarters is in Detroit. Section 201(c), 29 U.S.C. § 461(c), expressly limits venue to the "district in which such labor organization maintains its principal office." (Pet. App. at 72). On its face, that district is the Eastern District of Michigan, not the Eastern District of Missouri. For some reason, petitioners dislike Detroit. But that is their problem, not this Court's.

CONCLUSION

For the foregoing reasons, the Court should *deny* the Petition.

Respectfully submitted,

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